No. 82 6979

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ANTHONY J. LARETTE, JR.
Petitioner

v.

STATE OF MISSOURI

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Anthony J. LaRette, Jr., petitioner, through court-appointed counsel, and moves this Court for an order permitting him to proceed in forma pauperis pursuant to Supreme Court Rule 46.

Petitioner was given leave to proceed in forma pauperis on his direct appeal in the Supreme Court of Missouri. The State Public Defender was appointed to represent him in subsequent proceedings and assigned petitioner's case to the Public defender of the City of St. Louis.

Respectfully submitted,

JOSEPH W. DOWNEY
Public Defender
22nd Judicial Circuit

HENRY ROBERTSON
Assistant Public Defender
22nd Judicial Circuit
1320 Market Street
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(314) 622-4241

Attorneys for Petitioner

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Anthony J. LaRette, being first duly sworn, depose and say that I am a petitioner in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress, and that there is merit to the issues raised in my petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

Answer: No. 1978 $900.00 per. month

2. Have you received, within the past twelve months, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

Answer: No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: None

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

ANTHONY J. LARETTE

Subscribed and sworn to before me this ____ day of JUN 17 1983, 1982.

QUESTIONS PRESENTED FOR REVIEW

I

DOES THE FEDERAL CONSTITUTION REQUIRE, IN ADDITION TO THE PROCEDURES WHEREBY A TRIAL COURT AND JURY IMPOSE A DEATH SENTENCE, ANY SPECIFIC FORM OF "PROPORTIONALITY REVIEW" BY A COURT OF STATEWIDE JURISDICTION PRIOR TO THE EXECUTION OF A STATE DEATH JUDGMENT.

II

WHETHER THE MISSOURI SUPREME COURT, BY HOLDING THAT THE JURY FOUND TWO AGGRAVATING CIRCUMSTANCE, TORTURE AND DEPRAVITY OF MIND, WHEN ONLY ONE AGGRAVATING CIRCUMSTANCES WAS SUBMITTED TO THE JURY, NAMELY "THE OFFENSE WAS OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN IN THAT IT INVOLVED TORTURE, OR DEPRAVITY OF MIND," AND BY DOING SO WITHOUT STATING ANY SEPARATE FACTS ON WHICH SEPARATE FINDINGS COULD BE BASED, SO UPSET THE BALANCE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES CONSIDERED BY THE SENTENCER AS TO MAKE THE MISSOURI SUPREME COURT'S AFFIRMANCE OF THE DEATH SENTENCE UNCONSTITUTIONAL FOR FAILURE TO CONSTRUE MISSOURI'S DEATH PENALTY STATUTES AND REVIEW THE SENTENCE CONSISTENTLY WITH THE CONCERNS OF FURMAN V. GEORGIA, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

III

WHETHER THE MISSOURI SUPREME COURT CONTRAVENED THE RULING OF THIS COURT IN ZANT V. STEPHENS, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), BY HOLDING, WITHOUT GIVING ANY PREMISES OF STATE LAW FOR THIS HOLDING, THAT THE FAILURE OF ONE OF TWO OR MORE STATUTORY AGGRAVATING CIRCUMSTANCES DOES NOT VITIATE A DEATH SENTENCE RESTING THEREON.

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OPINION BELOW

The opinion of the Supreme Court of Missouri is reported as State v. LaRette, 648 S.W.2d 96 (Mo. banc 1983).

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on March 29, 1983.

Petitioner's Motion for Rehearing was denied on April 26, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Eighth Amendment.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Constitution, Fourteenth Amendment, Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Due to their length, the following statutes are set forth in the Appendix, at page A-29 thereof.

Section 565.001, R.S.Mo. 1978

Section 565.006, R.S.Mo. 1978

Section 565.008, R.S.Mo. 1978

Section 565.012, R.S.Mo. Supp. 1982

Section 565.014, R.S.Mo. 1978

Section 565.016, R.S.Mo. 1978

STATEMENT OF THE CASE

Petitioner Anthony J. LaRette, Jr., was convicted of capital murder in the Circuit Court of Warren County, Mo., and sentenced to death. On appeal, the Missouri Supreme Court affirmed the conviction and sentence.

The state's evidence tended to show the following. The victim, eighteen-year-old Mary Fleming, had been left alone in her apartment in St. Charles, Missouri, when her mother and sister left for work on the morning of July 25, 1980. At about 11:00 a.m. Mary appeared at a neighbor's house covered with blood and wearing only a bikini top pulled above her breasts, and collapsed. At about the same time, a man identified by a witness as petitioner was seen running to a car in the neighborhood and driving away.

The victim was seen at the emergency room at about 11:30. she showed no signs of life and could not be revived. There was an incised (slash) wound, five or six inches long, to her throat, and two stab wounds 3/4 inch to one inch long to her chest, one of which pierced the heart. The stab wounds, or at least the one to the heart, caused her death. There was a bruise on her forehead and small, incised "defense wounds" on her hands. Examination of the genital area revealed no sign of sperm or of trauma.

A number of admissions were introduced against petitioner. Confronted by a suspicious friend, petitioner said he was burglarizing the apartment when the girl walked in on him. He said he didn't want to hurt her and was going to leave. She started yelling, and he knocked her down and then stabbed her. He threw the knife in the river.

Petitioner was arrested in Topeka, Kansas, where his parents lived. He consented to speak to the two detectives who came to return him to St. Charles, Missouri, the site of the murder. He had just been released from the hospital following emergency room treatment for self-inflicted stab wounds. Petitioner put his hands

over his face and told the detectives, "I'm responsible for her death," because he had picked up a hitchhiker who committed the murder. Petitioner caught him in the act and tried to help the victim who got up and ran.

Petitioner told a Kansas deputy sheriff, apparently spontaneously, "I tried to choke her first, but I couldn't," and , "She promised not to scream, but she lied to me." He also said, "I caused an 18 year old girl to die."

In St. Charles, petitioner repeated the hitchhiker story until he was told that a witness described the suspect car as having only one occupant. Petitioner then started crying, admitted there was no hitchhiker, and said, "I did it. I didn't mean to hurt her." He said he entered the unlocked apartment to commit a burglary. A stiletto knife was in his pocket. He went down to the basement, and when he came back up the stairs he saw the victim with her shorts off, apparently changing clothes. (Her cutoff blue jeans were found in the living room, her panties on the kitchen floor.) He grabbed her, knife in hand, and told her he didn't want to hurt her, not to scream, and that all he wanted to do was get the hell out of there.

She agreed not to scream, and he let go of her. Then she started screaming. That's when it happened. "She lied to me. She promised me she wouldn't scream. I thought he was just like all the others. My wife and my mother-in-law always lied to me. If she hadn't lied to me it wouldn't have happened." Petitioner said he did not remember the rest of what happened in the apartment.

The federal questions raised in this petition arose only when the Supreme Court of Missouri handed down its opinion and judgment affirming the conviction and sentence. (Appendix (hereinafter A-)2). Petitioner's timely Motion for Rehearing (A-20) was denied (A-26). The following procedural background is relevant to the issues presented herein.

Under Missouri's death penalty laws, the jury, after a bifurcated trial, must find at least one statutory aggravating circumstance before it may proceed to consider mitigating circumstances and, in its discretion, impose the death penalty. Section 565.006; Section 565.012.5, R.S.Mo. 1978. One statutory aggravating circumstance was submitted to the jury in this case, Section 565.012.2(7):

> The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind.

The foreman of the jury wrote on the verdict form that the jury found (A-36):

> Torture, Depravity of mind and that as a result it was outrageous and wantonly vile, horrible and inhuman also (sic)
>
> Anthony J. LaRette, Jr. was convicted of rape in the District Court of Douglas County, State of Kansas on July 22, 1974.

Under Missouri law, the prior conviction is a "non-statutory" aggravating circumstance, State v. LaRette, 648 S.W.2d 96, 101 fn.2 (Mo. banc 1983), and therefore cannot support a verdict of death.

Missouri law also provides for mandatory review of all death sentences by the state high court. Section 565.014, R.S.Mo. 1978. In this case, the statutory review was disposed of as follows. 648 S.W.2d at 105:

> We turn now to defendant's contention that the sentence of death in this case is excessive and disproportionate.
>
> The General Assembly has mandated that this Court shall consider the matter of the death sentence being imposed and requires us to determine (Section 565.014.3, R.S.Mo. 1978):
>
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in secton 565.012; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We find nothing in the record to suggest the sentence resulted from the influence of passion, prejudice, or any other arbitrary factor. There was substantial evidence to support the jury's finding of statutory aggravating circumstances. We conclude that considering the instant crime and the defendnat in this case that the penalty imposed is not excessive nor disproportionate to the penalty imposed in similar cases. State v. Stokes, 638 S.W.2d 715 (Mo. banc 1982).

The judgment is affirmed.

ARGUMENT

A Missouri statute governing appellate review (Section 565.014.3, R.S.Mo. 1978) of a death sentence mandates the Supreme Court of the State to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 565.012; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The extent of the proportionality review required by subparagraph 3 of 565.014.3 in this cause was dispensed with in a single sentence: "We conclude that considering the instant crime and the defendant in this case that the penalty imposed is not excessive nor disproportionate to the penalty imposed in similar cases." 648 S.W.2d at 105. The Opinion further cites to a single case, State v. Stokes, 638 S.W.2d 715 (Mo. banc 1982), apparently suggesting that the facts in that case would support their earlier conclusion that the penalty imposed in this case is not excessive or disproportionate. The considerable discrepancies between Stokes and the defendant in the case at bar are set out in Judge Seiler's powerful dissent, 648 S.W.2d at 108-10. The dissent, unlike the majority opinion, proceeds to compare the circumstances surrounding the crime and the individual characteristics of the defendant against more than ten cases and concludes that "the death penalty can [not] stand in [this] particular case..."

This Court will soon hear oral arguments in Pulley v. Harris, cert granted, 51 U.S.L.W. 1144 (U.S. March 22, 1983) (No. 82-1095), which touch on similar and nearly identical areas of concern. In that case, the Court of Appeals of the Ninth Circuit vacated a sentence of death because the California Supreme Court refused to conduct any proportionality review as required by earlier state

court decisions and endorsed by the decisions of this Court. Harris v. Pulley, 692 F.2d 1189, 1196-97 (9th Cir. 1982). See also Collins v. Lockhart, No. 82-1769, ____ F.2d ____ (8th Cir. 1983).

When this Court in 1976 approved the Georgia, Florida and Texas capital-sentencing statutes on their faces, Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976), it did so on the assumption that the statutes at issue, as interpreted by the highest courts of the States, would guarantee against the arbitrary and capricious infliction of the death penalty which had been condemned in Furman v. Georgia, 408 U.S. 238 (1972). This Court placed particular reliance on the procedures for appellate review, Gregg v. Georgia, supra. 428 U.S. at 166-68, 204-06 (Op. of Stewart, Powell and Stevens, JJ.); at 222-24 (White and Rehnquist, JJ. and Burger, C.J., concurring), viewing it as an effective means by which the State would insure that the death penalty would be applied in a fair, rational, consistent, and even-handed manner, Proffitt v. Florida, supra, 428 U.S. at 259-60; Jurek v. Texas, supra, 428 U.S. at 276; see also Gardner v. Florida, 430 U.S. 349, 361 (1977), so that similar cases would reach similar results, Gregg v. Georgia, supra, 428 U.S. at 198, 208 (Op. of Stewart, Powell and Stevens, J.J.); Id., at 223 (White, J. concurring); Proffitt v. Florida, supra 428 U.S. at 251, 253, 258 (Op. of Stewart, Powell and Stevens, JJ.); Jurek v. Texas, supra, 428 U.S. at 270, (Op. of Stewart, Powell and Stevens, JJ.); Id. at 279 (White and Rehnquist, JJ. and Burger, C.J., concurring), and there would be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Gregg v. Georgia, supra 428 U.S. at 198, quoting from Furman v. Georgia, supra, 408 U.S. at 313 (White, J. concurring); Godfrey v. Georgia, 446 U.S. 420, 427 (Op. Stewart, Blackmun, Powell, Stevens, JJ.).

A key feature of the Florida, Georgia and Texas death sentencing procedures then sustained was that each provided "a prompt judicial review of the [sentencing]...decision in a court with statewide

consistent imposition of death sentences under law." Jurek v. Texas, 428 U.S. 262, 276 (plurality opinion). The functions of this appellate review are "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, 428 U.S. 153, 204 (plurality opinion), and to "insure that [death sentences] are consistent with other sentences imposed in similar circumstances." Proffitt v. Florida 428 U.S. 242, 253 (plurality opinion). The Court explicitly noted that the Georgia statute (identical to the Missouri statute) required "proportionality review" (Gregg v. Georgia, supra, 428 U.S. at 206) by commanding the Georgia Supreme Court to determine "Whether the [death] sentence [in each case] is disproportionate compared to those sentences imposed in similar cases" (Id. at 198) and quoted approvingly from the Florida Supreme Court's description of the function of its sentencing review "to '[guarantee] that the [aggravating and mitigating] reasons presented in one case will reach a similar result to that reached under similar circumstances in another case.'" (Proffitt v. Florida, supra, 428 U.S. at 251, quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)) By contrast, this Court struck down the North Carolina statute before it in Woodson v. North Carolina, 428 U.S. 280 (1976) observing that there is "no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of [the death sentencing]...power through a review of death sentences." Id., at 303; a footnote to this sentence consists exclusively of a cross-reference to Gregg's description of the Georgia proportionality review procedure, (Id. at 303 n. 38) and summarizing "Furman's basic requirement" as a procedure that replaced "arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." (Id., emphasis added).

These procedural safeguards are built into a constitutional statute because "...the State must administer its capital-sentencing procedures with an even hand, [citation omitted], [and thus] it is important that the record on appeal disclose to the reviewing court the considerations which motivate the death sentence in every case in which it is imposed. Without full disclosure of the basis of the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." Gardner v. Florida, 430 U.S. 349, 361 (1977). The statutory protections are required because experience demonstrates that constitutional rights cannot be protected by pious, naive expectations that they will be observed in the absence of adequate, compulsory procedures to preserve them. The Supreme Court of Missouri, conducting their alleged "proportionality review" in such a cursory, dilatory fashion has run roughshod over those protections preserved by the statute and relied on in this Court's opinions. The constitutional requirement for proportionality review is a byproduct of the recognition "...that death is a different kind of punishment than any other which may be imposed in this country. [Citations omitted.]" Gardner v. Florida, supra, at 357.

Further, the method of "no-review" adopted by the Missouri Supreme Court effectively denies the Appellant the opportunity to present to any reviewing tribunals his position on the proportionality review allegedly conducted. The Missouri statutory scheme requires a comparison of Defendant's case to "similar cases, considering both the nature of the crime and the defendant." Thus, in any particular appeal, a pool of "similar cases" will be drawn with which to compare petitioner's case. In order for petitioner to argue that his sentence is disproportionate to those sentences imposed in similar cases, however, petitioner must know what cases are deemed "similar." The only way this information would be

available is for him to be made aware of what criteria the Court utilizes in determining similarity. Obviously, the Court in this case has not made such criteria known.

The petitioner has the right to assistance of counsel with respect to issues concerning the sentence as well as the determination of guilt. Douglas v. California, 372 U.S. 353, 356-357 (1963). However by its refusal to in any way enunciate how the review was conducted or those cases that constitute the pool, the Supreme Court of Missouri has denied the petitioner his right to effective assistance of counsel. Such a right is meaningless if counsel is precluded from fully and effectively arguing Petitioner's case. By virtue of the non-disclosure of the criteria governing the proportionality review of Petitioner's death sentence, counsel is precluded from fully and effectively arguing his case in any reviewing court. Such a situation cannot be permitted, for the right to effective assistance of counsel includes the right to make meaningful argument to reviewing courts. Herring v. New York, 422 U.S. 853, 857-858, 862 (1975).

By failing to disclose to petitioner and others similarly situated the criteria or pool of similar cases by which proportionality review is to be conducted, the Missouri Supreme Court has effectively removed proportionality review from the adversary process.

> "Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases..."
>
> "We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida, 430 U.S. 349, 360, 362 (1977).

Due process as well is denied when counsel is refused the opportunity to comment on the facts considered in the review of proportionality of sentences imposed in "similar" cases and present his arguments to reviewing courts.

Even if this Court were to decide in Pulley v. Harris that proportionality review, presently required by thirty-one states, is not a federal constitutional requirement, the action of the Missouri Supreme Court in refusing to follow the statutory scheme as set out by the Legislature is a violation of the petitioner's right to due process under the Fourteenth Amendment. Where the state creates a substantial right, such as proportionality review, the arbitrary denial of that right by the state is a federal due process violation even if the right itself is not federally guaranteed.

In Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), the petitioner's sentence had been affirmed by a state appellate court even though the statute, under which a sentencing jury was instructed to impose a mandatory minimum sentence, had been held unconstitutional by the state courts. This Court found a denial of due process:

> "It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a state has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, (citation) and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state. (Citations)."

In Missouri, as in Georgia, this Court is once again faced with the inevitable conclusion "that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that [this] Court contemplated and hoped for in Gregg." Godfrey v. Georgia, supra, 446 U.S. at 439 (Concurring Opinion Marshall and Brennan, JJ.).

QUESTION PRESENTED - II

This Court has emphasized the role of meaningful appellate review as a safeguard against the arbitrary and capricious infliction of the death penalty. Proffitt v. Florida, 428 U.S. 242, 252-53, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). As Zant v. Stephens, 456 U.S. 410, 102 S.Ct. 1856, 1857, 72 L.Ed.2d 222 (1982), says of the Georgia scheme, on which Missouri's is patterned, State v. Mercer, 618 S.W.2d 1, 5 (Mo. banc 1981):

> We recognized [in Gregg v. Georgia] that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing capital sentences consistently with this concern [of Furman v. Georgia, 408 U.S. 238].

The Missouri Supreme Court's perfunctory review in this case is constitutionally deficient.

As part of its mandatory death sentence review, the Missouri Supreme Court must determine

> Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012.

Section 565.014.3(2), R.S.Mo. 1978. The only aggravating circumstance submitted in this case was Section 565.012.2(7), "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

The Missouri Supreme Court ruled this issue in the following language: "There was substantial evidence to support the jury's finding of statutory aggravating circumstances." 648 S.W.2d at 105.

The use of the plural is explained by the Court's ruling on an issue raised by petitioner on his direct appeal (See A-44), that there was insufficient evidence to support a finding of torture. The majority held that the jury had found both torture and depravity of mind and that therefore they had found two aggravating circumstances. Yet the Court failed to state any separate facts upon which findings of torture and depravity of mind could be based

They went on to add that even if torture were not shown on the record, the sentence of death would not fail since depravity still was shown. 648 S.W.2d at 101-2.

In its zeal to enforce the death sentence, the Missouri Supreme Court found two aggravating circumstances where the law, the facts and the jury's verdict supported only one. It violated the statutes the constitutionality of which depends on its meaningful review of death sentences. And it violated this court's ruling in Zant v. Stephens, supra.

Section 565.012.2(7), R.S.Mo. 1978, comprises one statutory aggravating circumstance, the only one submitted to the jury (A-39): "The offense was outrageously or wantonly vile, horrible or inhuman..." Torture or depravity is not the aggravating circumstance but is that which makes the offense vile, horrible, or inhuman. In Godfrey v. Georgia, 446 U.S. 420, 430-31, 100 S.Ct. 1759, 1766, 64 L.Ed.2d 398 (1980), the plurality opinion of this Court adopted the Georgia Supreme Court's construction of the same terms, torture and depravity of mind, as standing in a cause and effect relation, depravity being the state of mind that results in torture to the victim.

But even if the Court accepts the Missouri Supreme Court's splitting of the aggravating circumstance as a matter of statutory construction, there is substantial authority from the high courts of sister states that it is unreasonable and unfair to use the same facts, or the same aspect of a crime, to constitute two aggravating circumstances. Cook v. State, 369 So.2d 1251, 1256 (Ala. 1978); Provence v. State, 337 So.2d 783, 786[3] (Fla. 1976); State v. Rust, 250 N.W.2d 867, 873-74 (Neb. 1977)

It would be naive to argue that mere number determines the weight of the aggravating circumstances; nonetheless it is a factor in the balancing process, as Zant v. Stephens, supra, implies. Furthermore, the Missouri Supreme Court put a construction on the

verdict that the jury could not possibly have intended, since they were instructed to consider a single aggravating circumstance (A-39). The Court thus upset the balance of factors which channeled the jury's discretion. Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976).

QUESTION PRESENTED - III

Finally, as the concurring opinion of Welliver, J., makes abundantly clear, the Court prematurely purports to decide the issue reserved by this Court in Zant v. Stephens, 456 U.S. 410. See 648 S.W.2d at 106-7. Without stating any grounds, the majority holds sua sponte that the failure of one of two aggravating circumstances does not taint the death sentence. 648 S.W.2d at 102.

This is precisely the question certified in Zant v. Stephens. Other courts have given it proper consideration and reached the contrary conclusion. Menendez v. State, 368 So.2d 1278, 1282[6] (Fla. 1979); People v. Brownell, 404 N.E.2d. 181, 195[19] (Ill. 1980). Its presence in this case has the sole purpose of evading meaningful review.

In summary, the Missouri Supreme Court has not hesitated to make bad law whenever that expedient will aid them in affirming a death sentence. Only this Court can halt the degeneration of this form of constitutionally mandated appellate review into an exercise in vindictiveness.

CONCLUSION

For the foregoing reasons, petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

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[5] Because we have held that § 144.020.1(2) imposes a tax upon the receipts of coin-operated amusement devices located in places of amusement, etc., it follows that promulgation of Rule 12 CSR 10–3.176, being a proper interpretation of the statute insofar as it pertains to coin-operated amusement devices, was not in disregard of the 1974 injunction. Thus, without deciding whether contempt was the appropriate remedy, we hold that the judgment of civil contempt is reversed and remand with directions to the trial court to set aside the judgment of contempt.

HIGGINS, J., concurs.

WELLIVER, P.J., concurs in result in separate opinion filed.

BLACKMAR, J., not participating because not a member of the court when cause was submitted.

WELLIVER, Judge, concurring in result.

I concur in the result. I am not persuaded that the rule in question falls within the parameters of the statute, but I do believe that contempt is an improper remedy. Inherent in the rulemaking authority is the authority to promulgate rules that may subsequently be declared invalid.

I make two observations regarding today's decision. First, the principal opinion does not decide whether a tax may be imposed in any specific instance. Such a decision would necessarily depend upon facts developed more fully than those stipulated here. Second, it is unnecessary to consider in this case whether for tax purposes there is a rational basis for distinguishing between pinball machines and other such devices located in places of amusement and those located elsewhere.

STATE of Missouri, Respondent,

v.

Anthony Joe LaRETTE, Jr., Appellant.

No. 63569.

Supreme Court of Missouri,
En Banc.

March 29, 1983.

Rehearing Denied April 26, 1983.

Defendant was convicted in the Circuit Court, Warren County, Edward D. Hodge, J., of capital murder, and he appealed. The Supreme Court, Billings, J., held that: (1) defendant failed to sustain burden that failure to bring him to trial within statutory period was occasioned by State; (2) evidence supported finding that defendant's acts involved both torture and depravity, two aggravating circumstances for imposition of death penalty; (3) evidence was sufficient to demonstrate elements of deliberation and premeditation necessary for capital murder; (4) evidence supported finding that defendant's statements to police were voluntary; and (5) death penalty was not excessive or disproportionate.

Affirmed.

Welliver, J., concurred in result and filed opinion.

Seiler, J., filed opinion concurring in part and dissenting in part.

1. Criminal Law ⇐1144.13(8)

In determination of whether there was sufficient substantial evidence to support guilty verdict of capital murder, Supreme Court will consider facts in evidence and all favorable inferences reasonably to be drawn therefrom in light most favorable to State and disregard all contrary evidence and inferences.

because it was felt that the language already used was clear and unambiguous and no amendment was necessary. *Id.* at 601–02.

2. Criminal Law ⇐577.16(9)

Delays in bringing defendant to trial within statutory 180 days were attributable to delays occasioned by pretrial motions, change of venue, and continuances because of preparation of preliminary hearing transcript, and thus defendant failed to sustain his burden that failure to bring him trial within statutory period was occasioned by State. V.A.M.S. § 545.780.

3. Homicide ⇐354

Evidence was sufficient and substantial to support finding that murder of victim by defendant involved both torture and depravity, aggravating circumstances justifying imposition of death penalty. V.A.M.S. §§ 565.012, 565.012, subd. 2(7).

4. Criminal Law ⇐1208(1)

Where two or more statutory aggravating circumstances are found by jury, failure of one circumstance does not taint proceedings so as to invalidate other aggravating circumstance found and sentence of death thereon. V.A.M.S. § 565.012.

5. Criminal Law ⇐1208(1)

Having found threshold requirements of statutory aggravating circumstances, jury could also consider defendant's prior convictions, including rape, together with all evidence adduced at trial, in imposing death sentence. V.A.M.S. § 565.012.

6. Homicide ⇐253(1)

Evidence supported finding that defendant intended to take life of victim and acted with necessary premeditation and deliberation, thereby supporting conviction of capital murder.

7. Homicide ⇐145

Killing through use of deadly weapon on vital part of body of victim is sufficient to permit finding of intent to kill.

8. Criminal Law ⇐412.1(1)

Evidence supported finding that during course of deputy's advising defendant of his rights with regard to extradition, defendant spontaneously volunteered inculpatory statement, and therefore, since there was no interrogation of defendant by deputy sheriff when defendant made incriminating statement and since statement was unsolicited and volunteered, it was properly admitted. U.S.C.A. Const.Amend. 5.

9. Criminal Law ⇐359

Disconnected and remote acts, outside crime itself, cannot be separately proved for purpose of pointing up someone other than accused, and evidence which can have no other effect than to cast bare suspicion on another, or to raise conjectural inference as to commission of crime by another is not admissible.

10. Criminal Law ⇐338(4)

Trial court in capital murder prosecution properly excluded defendant's proffered evidence of obscene telephone calls received by victim during year prior to her slaying; defendant's suggestion that the person responsible for calls may have been the killer ignored his multiple admissions that he choked, struck, slashed and stabbed victim.

11. Criminal Law ⇐404(1)

Demonstrative evidence is admissible if it throws any relevant light upon a material matter in issue.

12. Criminal Law ⇐404(2)

Articles, instruments and weapons that have tendency to explain manner in which crime is committed that are found at or near scene of crime are generally admissible.

13. Criminal Law ⇐404(2)

Articles, instruments and weapons that have a tendency to explain manner in which crime was committed and that are found at or near scene of crime are usually held admissible if tending to connect defendant with crime, prove identity of deceased, show nature of any wounds, or throw any relevant light upon any material matter in issue.

14. Criminal Law ⇐404(4)

Victim was wearing cutoff jeans when defendant followed her to apartment, and articles of clothing, their condition, and location within apartment supported State's

theory that defendant was pursuing victim and removing her clothing as he was attacking her with knife, thereby supporting admission of cutoff shorts, panties and shoes discovered in victim's apartment.

15. Criminal Law ⇐414

Sufficient evidence supported determination that defendant's inculpatory statements were voluntary, refuting contention by defendant that the statements were constitutionally infirm because he had been deprived of sleep, food and drink, and because of his physical and mental condition. U.S.C.A. Const.Amend. 5.

16. Criminal Law ⇐438(1)

Trial court is vested with broad discretion in admission of photographic evidence.

17. Criminal Law ⇐438(5)

Trial court in capital murder prosecution did not abuse its discretion in admitting photographs of victim's hands, portraying the "defense wounds," where coroner had testified to nature of cuts to victim's hands before he identified questioned photographs.

18. Constitutional Law ⇐266(3.1)

Fact that witnesses were allowed to choose between only two photographs in identifying alleged get-away vehicle did not violate defendant's right to due process. U.S.C.A. Const.Amends. 5, 14.

19. Criminal Law ⇐1206(2)
Homicide ⇐354

Sentence of death was properly imposed on defendant convicted of capital murder of 18-year-old victim; nothing in record suggested sentence resulted from influence of passion, prejudice, or any other arbitrary factor, there was substantial evidence to support jury's finding of statutory aggravating circumstances, and penalty was not excessive nor disproportionate to penalty imposed in similar cases. V.A.M.S. § 565.014, subd. 3.

Donald C. Tiemeyer, St. Charles, for appellant.

John Ashcroft, Atty. Gen., Kelly Klopfenstein, Asst. Atty. Gen., Jefferson City, for respondent.

BILLINGS, Judge.

Defendant Anthony J. LaRette, Jr., was sentenced to death for the capital murder of 18-year-old Mary Fleming. In this appeal he contends he was denied his statutory right to a speedy trial; the evidence was insufficient for the jury to find torture as an aggravating circumstance; torture or depravity of mind as aggravating circumstances gives the jury a roving commission to return the death penalty; Missouri's death penalty statutes are unconstitutional; the evidence fell short of demonstrating deliberation and premeditation; the death penalty is excessive and disproportionate in this case; and, the trial court erred in certain evidentiary rulings. We affirm.

[1] In our determination of whether there was sufficient substantial evidence to support the guilty verdict of capital murder, we consider the facts in evidence and all favorable inferences reasonably to be drawn therefrom in the light most favorable to the State and disregard all contrary evidence and inferences. *State v. Franco*, 544 S.W.2d 533 (Mo. banc 1977), *cert. denied*, 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977).

Mary Fleming lived with her mother and sister in an apartment complex in St. Charles, Missouri. Her mother left for work about 6:30 a.m. the morning of July 25, 1980, and the sister left for work approximately thirty minutes later. The mother exited the apartment by the back door, locking it. The sister locked the front door when she left the apartment. Mary was still asleep.

A grocery store is located adjacent to the apartment complex and at 10:30 a.m. Mary, wearing a swimming suit bikini top and cutoff jeans, cashed a check and purchased groceries. She was seen walking towards her apartment a short time later. During this same time frame a cream-colored convertible automobile had been seen slowly circling the neighborhood. There was only

one individual in the convertible, a white man, the driver.

Sometime between 10:30 and 11:00 a.m. a friend of Mary Fleming, Mary Ellen Sommerville, telephoned the Fleming apartment. A strange male voice answered the telephone. Mary Ellen asked to speak to Mary. The male voice said she was not there and asked who was calling. The girl replied "Elly" and the male voice said he would have Mary call her back and hung up. Mary Ellen testified the male voice "was a high pitched voice because he seemed to be laughing or something, being in a good mood or maybe drinking or something." Because Mary Ellen had talked with Mary Fleming earlier that morning and did not know the voice that answered the telephone and "it was kind of weird," she immediately dialed the Fleming number again. There was no answer.

At approximately 11:00 a.m. a man, identified as defendant, was seen running from the direction of the apartment complex to a cream-colored convertible automobile which was parked on the grocery store parking lot. Defendant got into the vehicle and drove away. At about the same time a man and his wife who lived in another apartment complex behind and across a yard and street from the Fleming apartment saw Mary running towards their home. She was bloody and naked except for the bikini top which had been pulled up, exposing her breasts. She made it to the front door of the neighbors' apartment before she collapsed, bleeding profusely. Police and medical aid arrived shortly. Despite on-the-scene and hospital emergency medical efforts, Mary died shortly thereafter.

Death was attributed to the young blond girl having bled to death. Her throat had been cut from ear to ear by a sharp instrument and photographic exhibits graphically illustrate she was nearly decapitated. She had two stab wounds to the chest, one of which penetrated her lung, the second penetrating her heart. The second stab wound had passed through the heart, leaving the tip of a metal blade in her lung. Her forehead and right arm were bruised and she had numerous cuts, termed "defense wounds", to her fingers and hands.

An examination of the Fleming apartment quickly demonstrated it was the scene of the bloody slaying. In the front living room there was a pair of cutoff jeans on the floor, blood and hair on the walls, blood on the end and coffee tables, and a large puddle of blood in the middle of the floor. An unopened and blood splattered purse, containing money, was on a coffee table. In a hallway between the living room and kitchen was a trail of blood. Female panties, spotted with blood, were on the kitchen floor. The back door was blood smeared and there was a trail of blood across the back porch and steps. A burner on the kitchen stove was still on and a pot of water with eggs in it were on the burner. A partially completed green salad was on a kitchen counter.

For several days before July 25 defendant had been staying with Richard Roberson. On that Friday morning defendant was dressed in light trousers and a button shirt. He drove Roberson to work in Roberson's yellow Buick convertible and borrowed the car "to go on a job interview". Defendant picked Roberson up at 1:15 p.m. and at that time was dressed in a t-shirt and cutoff jeans. Roberson never again saw the clothing defendant was wearing Friday morning.

Two days later, Sunday, Roberson drove defendant to defendant's parents' home in Topeka, Kansas. As Roberson was leaving for the return trip, defendant said: "If you have any problems down there, call me and I'll take care of them." Roberson did not know what defendant was talking about.

By Tuesday, July 29, Roberson became concerned because of news articles which appeared to link his convertible with the killing. He called defendant in Topeka but defendant was reluctant to talk about the murder over the telephone. Further telephone calls elicited admissions from the defendant that he had killed the 18-year-old girl. Defendant said he first saw the girl when she was cashing a check at the gro-

cery store and he followed her back to her apartment. He said he had thrown the murder weapon, a stiletto-type lock blade knife, in the river. He told Roberson that he went into the Fleming apartment for the purpose of burglarizing it and the victim walked in on him. He said he struck the girl and knocked her down; that he had stabbed her; and, cut her throat as she attempted to run away from him. Although he had earlier told Roberson he did not know why he had killed the girl, he later said she started yelling and tried to run. At the time of one of the telephone conversations a police officer at Roberson's residence listened on an extension telephone and heard the defendant say the knife he used was in the river and he planned to stay away from his parents' home for thirty days until "the heat was off."

St. Charles detectives first questioned defendant about the murder early in the morning of August 7, 1980, in the Shawnee County jail in Topeka, Kansas, after first giving him *Miranda*[1] warnings and having him initial and sign a printed form which explained his constitutional rights. When he was asked about his involvement in the crime he put his hands over his eyes and said: "I'm responsible for her death." In this interview he told the officers he had picked up a hitchhiker near Roberson's house and the hitchhiker asked him if he would take him to the house of a girl who owed him some money. He said he drove the hitchhiker to a grocery store parking lot and parked at the edge of the lot next to some apartments. The hitchhiker got out of the car and went into one of the apartments. After waiting about 15 minutes he got worried about the hitchhiker and went to the front door of the apartment and looked inside. He said the hitchhiker was either standing or bending over a girl. The girl was covered with blood. The hitchhiker was stabbing her while she was pleading for her life. He said the hitchhiker ran out of the front door of the apartment when he entered it. He told the officers the girl's throat was cut but he wasn't worried about that too much because she wasn't gurgling, but was worried about the stab wounds to her chest and tried to apply direct pressure to her chest to stop the bleeding. The girl started fighting him and broke away and ran out the back door. He had her blood all over his hands, was scared, and ran out the front door.

Later that morning at the Shawnee County jail, a deputy sheriff was advising defendant of his extradition rights. During the course of this procedure the defendant exclaimed: "I tried to choke her first but I couldn't. She promised not to scream, but she lied to me. I caused an 18-year-old to die."

Defendant was returned to St. Charles that day and interviewed again that evening. He was again advised of his constitutional rights and signed another written waiver. He told the officers he took the hitchhiker to the girl's apartment but said that when he went to find the hitchhiker he saw him either kneeling or laying on the girl; that the hitchhiker's pants were pulled down and his buttocks exposed, and there was blood all over the girl. In this version he told the officers the hitchhiker ran out the back door of the apartment. When the officers related what witnesses had told them about the convertible circling the neighborhood and neighbors had seen only Mary Fleming exiting via the back door, defendant began crying and admitted there was no hitchhiker and said "I did it."

Defendant then told the officers he entered the Fleming apartment by means of an unlocked rear door to burglarize the apartment. He first went downstairs and then came back up the stairs and the victim was standing in her living room and had already removed her shorts. He had the knife in his hand and grabbed her and told her he did not want to hurt her, "not to scream, that all he wanted to do was get the hell out of there." He said the girl agreed not to scream and he let her go. He said she started to scream and "[T]hat is when it happened. She lied to me. She promised me she wouldn't scream." De-

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

fendant said she was just like "... all the others. My wife and my mother-in-law always lied to me. If she hadn't lied to me it wouldn't have happened." Defendant then told the officers he did not remember what happened after the girl started screaming and that he left by the front door and went to Roberson's car.

At trial defendant presented evidence but did not testify.

Defendant was arraigned on November 21, 1980, in the Circuit Court of St. Charles County and trial commenced in the Warren County Circuit Court on August 11, 1981. He contends he was denied his statutory right to a speedy trial under § 545.780, RSMo 1978.

At the time of defendant's arraignment, the parties consented that the case be continued until December for the setting of various motions. On January 7, 1981, defendant filed a motion to dismiss or in the alternative to compel the State to elect to proceed on one of the alternative charges [capital murder and/or murder in the first degree] and this was followed by defendant's motion for a change of venue on January 14, 1981. The case was lodged in Warren County on January 27, 1981, and set for trial on May 28, 1981. On April 20, 1981, defendant filed a motion to remove the case from the trial docket because the transcript of his preliminary hearing had not been completed, nor had the transcript of a deposed witness. The State consented to the motion and the court, treating it as one for continuance, found "[T]he ends of justice served by the granting of such continuance outweighs the best interests of the public and the defendant in a speedy trial" and found that the transcript of the preliminary hearing had not been made available to the defendant and further discovery might be necessary upon the transcript being completed. The case was reset for June 11, 1981. On June 3, 1981, the State filed a motion to continue the case because the transcript, being prepared from tape recordings by the State Court Administrator's Office, had not yet been completed. On the same date the court entered an order continuing the case to August 11, 1981, the order reciting the continuance was for the same reasons as set forth in the formal order of April 20, 1981.

[2] Section 545.780, RSMo 1978, expressly excludes periods of delay resulting from hearings on pretrial motions, resulting from a change of venue, and continuances based upon findings by the trial court that the ends of justice served by taking such action outweigh the benefits of a speedy trial. Here, the delays in bringing the defendant to trial within the statutory 180 days were attributable to delays occasioned by pre-trial motions, change of venue, and continuances because of the preparation of the preliminary hearing transcript. The defendant has failed to sustain his burden that the failure to bring him to trial within the statutory period was occasioned by the State. *State v. Franco*, 625 S.W.2d 596 (Mo.1981); *State v. Newberry*, 605 S.W.2d 117 (Mo.1980).

Defendant avers there was insufficient evidence for the jury to find torture as an aggravating circumstance. He notes that under § 565.012, RSMo 1980 Supp., the death penalty cannot be imposed unless one of the statutory aggravating circumstances in that section is found by the jury. The particular subparagraph of § 565.012.2(7), which is applicable to this case provides:

> The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind.

In this case the jury, in imposing the death sentence, found the offense was outrageously or wantonly vile, horrible or inhuman because defendant's acts involved *both* torture and depravity.[2]

[3] We believe the evidence surrounding the brutal, heinous, and senseless slaying of the 18-year-old victim in this case fully warranted the jury to find *both* aggravating

2. The jury also found the non-statutory aggravating circumstance that defendant had been convicted of rape in Kansas in 1974.

circumstances. It is obvious that Mary Fleming had ample opportunity to anticipate her death and her slaughter-type killing supports the further finding of depravity of mind. Her body bore mute and stark evidence of the serious physical abuse and pain and suffering she endured in her futile struggle for life. The photographic exhibits, as well as the medical testimony, demonstrate the bruising of her head and arm, the cuts or defense wounds to her hands and fingers, the stab wounds to her chest and the near decapitation by reason of her throat having been cut from ear to ear. These matters and the physical evidence in the apartment suggest she was pursued from one end of the apartment to the other as defendant struck, stabbed and slashed her. A large pool of blood and her cutoff jeans were on the living room floor. Blood and hair were on the living room wall and blood was splattered over various articles of furniture in that room. There was blood on the doorway between the living room and kitchen, as well as on the floor of the hallway. Female panties, blood splattered, were on the kitchen floor. The trail of blood was evident on the rear door, across the porch, and down the steps as the girl, practically naked, made her way across the street to the neighbor's front door.

[4, 5] The State suggests the jury could have well concluded that defendant was describing what actually transpired when he told the officers the phantom hitchhiker was kneeling or laying on the girl with his pants down and she was pleading for her life as she was being repeatedly stabbed. Aside from this, we are of the opinion the evidence was sufficient and substantial to support the finding of both statutory aggravating circumstances. Mary Fleming had no quick death and had substantial time to contemplate her fate. *State v. Blair*, 638 S.W.2d 739 (Mo. banc 1982). Furthermore, as noted in *State v. Mercer*, 618 S.W.2d 1, 10 (Mo. banc 1981), where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstances does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death thereon. Having found the threshold requirements of statutory aggravating circumstances, the jury could also consider the defendant's prior convictions[3], including rape, together with all of the evidence adduced at trial, in imposing the death sentence. *State v. Stokes*, 638 S.W.2d 715 (Mo. banc 1982).

Defendant's contention that § 565.012.2(7), RSMo 1980 Supp., is facially violative of the United States and Missouri Constitutions has been expressly considered and rejected by this Court. *State v. Newlon*, 627 S.W.2d 606 (Mo. banc 1982), *cert. denied*, — U.S. —, 103 S.Ct. 185, 74 L.Ed.2d 149 (1982). *Newlon* and *State v. Bolder*, 635 S.W.2d 673 (Mo. banc 1982), likewise rejected defendant's further contention that Missouri's death penalty fails to measure up to constitutional standards.

[6] Defendant next contends the evidence was insufficient to demonstrate the elements of deliberation and premeditation necessary for capital murder. In *State v. Craig*, 642 S.W.2d 98, 101 (Mo. banc 1982), we said:

> There need not be direct evidence of premeditation and deliberation to support a capital murder conviction; indirect evidence and inferences reasonably drawn from circumstances surrounding the murder are sufficient. *State v. Turner*, 623 S.W.2d 4, 7 (Mo. banc 1981). Premeditation is present if the accused reflects on his act for any length of time prior to the act. Deliberation is found when an act is performed with a cool and deliberate state of mind. *Id.* at 7; *State v. Strickland*, 609 S.W.2d 392, 394 (Mo. banc 1980).

The jury could reasonably find that defendant, armed with a sharp, stilleto type lock-blade knife, drove slowly around the

3. In addition to defendant's 1974 rape conviction the evidence in the punishment phase of the trial showed prior convictions for burglary, theft and pocket picking. Section 565.006.2, RSMo 1978. *See: State v. Blair*, 638 S.W.2d 739, 756 (Mo. banc 1982), *cert. denied*, — U.S. —, 103 S.Ct. 838, 74 L.Ed.2d 1030 (1983).

neighborhood where the victim's apartment was located looking for a female target; that upon seeing the young and attractive girl, attired in cutoff jeans and a bikini top, he admittedly followed her to her apartment for the express purpose of committing a crime; that the jury could reasonably find, contrary to his hitchhiker and burglary versions, that he entered the apartment for the purpose of sexually assaulting the girl. Such an inference can be drawn from the physical facts observed in the apartment. The obvious struggle in the living room where her shorts were found. The bloody trail to the kitchen where her panties were on the floor. The bikini top pulled up, exposing her breasts. Defendant said the victim lied to him because she promised him she would not scream and because she did scream he did "it". This statement, in itself, demonstrates defendant deliberated his action prior to stabbing, cutting and killing Mary Fleming.

[7] A killing through the use of a deadly weapon on a vital part of the body of the victim is sufficient to permit a finding of intent to kill. *Strickland, supra*, at 394. The jury could have found from the number and serious nature of the knife wounds that defendant was practically certain to cause Mary Fleming's death. And, the previously demonstrated intent to kill provided deliberation. *State v. Bolder, supra* at 673.

On the record before us, the jury could reasonably find defendant intended to take the life of the girl and acted with the necessary premeditation and deliberation.

[8] Defendant's complaint regarding the admission of the testimony of the Shawnee County Deputy Sheriff because this officer had not given him *Miranda* warnings prior to interrogating him is totally without merit. Contrary to defendant's unsupported assertion, the evidence clearly shows there was no interrogation of defendant by the Kansas officer concerning the killing of Mary Fleming.

Aside from the fact defendant had previously been given *Miranda* warnings and signed a waiver, the uncontradicted evidence was that during the course of the deputy's advising defendant of his rights with regard to extradition, defendant spontaneously volunteered: "I tried to choke her first, but I couldn't .... She promised not to scream, but she lied to me .... I caused an 18-year-old girl to die."

There being no interrogation of defendant by the deputy sheriff when defendant made the incriminating statement and the statement being unsolicited and volunteered, it was properly admitted. *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *State v. O'Toole*, 619 S.W.2d 804 (Mo.App.1981).

[9, 10] The trial court properly excluded defendant's proffered evidence regarding obscene telephone calls received by Mary Fleming during the year prior to her slaying. Disconnected and remote acts, outside the crime itself, cannot be separately proved for the purpose of pointing up someone other than the accused; and evidence which can have no other effect other than to cast a *bare* suspicion on another, or to raise a conjectural inference as to the commission of the crime by another is not admissible. 22A C.J.S. Criminal Law § 622b at 451; *State v. Stokes*, 638 S.W.2d 715 (Mo. banc 1982); *State v. Umfrees*, 433 S.W.2d 284 (Mo. banc 1968). Defendant's suggestion that the person responsible for the obscene telephone calls may have been the killer ignores defendant's multiple admissions that he choked, struck, slashed and stabbed Mary Fleming.

[11–14] Defendant's assignment of error in the admission of the cutoff shorts, panties, and shoes because the evidence did not establish they belonged to the victim is denied. Demonstrative evidence is admissible if it throws any relevant light upon a material matter in issue. *State v. Bolder, supra*, at 688. Articles, instruments and weapons that have a tendency to explain the manner in which a crime is committed that are found at or near the scene of the crime are generally admissible. *State v. Neal*, 591 S.W.2d 178 (Mo.App.1979). Such evidence is usually held admissible if it tends to connect the defendant with the

crime, prove the identity of the deceased, shows the nature of any wounds, or throws any relevant light upon any material matter in issue. *State v. Williams*, 606 S.W.2d 254 (Mo.App.1980). Mary was wearing cut-off jeans when defendant followed her to her apartment. The articles of clothing, their condition, and location within the apartment support the State's theory that defendant was pursuing his victim and removing her clothing as he was attacking her with his knife.

Defendant levels a double-barreled attack on the trial court's admitting his statements to the St. Charles police officers who first questioned him in Topeka and later at St. Charles. He first claims the statements were constitutionally infirm because he had been deprived of sleep, food and drink, and his physical and mental condition; secondly, his request to return to his cell in Topeka because he was tired and hurting, was an assertion of his right to remain silent and the subsequent questioning at St. Charles violated this right.

Out of the hearing of the jury, an evidentiary hearing was conducted on the voluntary nature of defendant's statements. Defendant did not testify but the court heard the testimony of the St. Charles officers, the stipulated testimony of a Topeka medical doctor, and had before it the waiver forms executed by the defendant.

As a result of self-inflicted superficial wounds and cuts, defendant was treated in the emergency room of a Topeka hospital late in the afternoon of August 6. He remained at the hospital until shortly after midnight and was taken by Kansas officers to the Shawnee County jail. St. Charles detectives went to the jail at about 3:00 a.m. and asked defendant if he felt up to talking to them about a homicide in St. Charles on July 25. Defendant replied "yes" and asked for and received a cigarette. *Miranda* warnings were given and defendant signed a "Constitutional Rights" waiver form. After defendant had related his first version of the hitchhiker being the killer, he told the detectives "I'm tired and I'm hurting and I would like to go back to my cell." No further questions were asked and defendant was returned to his cell. The interview had lasted approximately thirty minutes.

The St. Charles officers picked defendant up at the jail between 10:30 and 11:00 that morning for the return trip to St. Charles. On the trip the defendant slept most of the five to six hours it took to drive from Topeka to St. Charles. Enroute the defendant requested and was given a soda. Defendant was lodged in the St. Charles jail and at some point prior to his second questioning by the detectives he was given a hamburger and coffee. The second interview commenced about 7:40 p.m. and before defendant was questioned he was again given the *Miranda* warnings and signed a waiver form. At no time did the defendant indicate he did not want to talk to the officers, nor did he complain of being tired, hungry, thirsty or in pain. The trial judge found and determined that both statements of the defendant were voluntarily given. The jury was also instructed concerning the issue of voluntariness and told to disregard them if they found the statements were made involuntarily.

[15] The record shows that defendant was given the warnings required by *Miranda* on the two occasions he was interviewed by the St. Charles detectives and that he understandingly declined to exercise his right to remain silent. *State v. Hughes*, 596 S.W.2d 723 (Mo. banc 1980). As stated in *Hughes, supra*, at 726–27:

> When a criminal defendant alleges that his inculpatory statements, made while he was held in custody, are not admissible because involuntarily made, the state must bear the burden of proving the voluntariness of the confessions. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966). A confession is admissible if the state proves by a preponderance of the evidence that it was voluntary. *Lego v. Twomey*, 404 U.S. 477, 482–87, 92 S.Ct. 619, 623–25, 30 L.Ed.2d 618 (1972); *State v. Olds*, 569 S.W.2d 745, 751–52 (Mo. banc 1978). The state must show that 'defendant was ef-

fectively advised of his rights and he then intelligently and understandingly declined to exercise them.' *State v. Alewine*, 474 S.W.2d 848, 851 (Mo.1971).

The determination of the voluntariness of a statement is made in the first instance by the trial court. The trial court must determine the credibility of witnesses, and where evidence is in conflict, make factual findings. On appeal, the question is 'whether the evidence was sufficient to sustain the trial court's finding that the statement was voluntarily given.' *Alewine*, 474 S.W.2d at 852.

We find there was sufficient evidence to support the trial court's determination that defendant's statements were voluntary, and to support a jury finding the defendant made the statements freely and voluntarily.

[16, 17] The trial court did not abuse its discretion in admitting photographs of the victim's hands, portraying the "defense wounds". Defendant avers that the coroner's identification of the photographs as pictures of Mary's hands was based upon only an identification bracelet which had been placed on her wrist by medical authorities.

A series of colored photographs of Mary Fleming's bloody and mutilated body were taken by police and received as exhibits. The coroner had been advised of the victim's name and after his examination filled out the official death certificate. A comparison of the photographic exhibits clearly show the hands depicted in exhibits 49 and 50 were a part of the series of photographs of the body of the slain girl.

The trial court is vested with broad discretion in the admission of photographic evidence. *State v. Weekley*, 621 S.W.2d 256 (Mo.1981); *State v. Goodman*, 608 S.W.2d 498 (Mo.App.1980); *State v. Hines*, 581 S.W.2d 109 (Mo.App.1979). Here, the coroner had testified as to the nature of the cuts to Mary's hands before he identified the questioned photographs. We find no error.

[18] Defendant's final point of alleged trial error is novel but without legal support. He contends: "The trial court violated the defendant's right to due process of law when it admitted photographs of an alleged get-away vehicle because the display of vehicles used by investigation officers was unduly suggestive in that the witnesses were allowed to choose between only two photographs."

Defendant suggests we expand the constitutional safeguards surrounding the identification of criminal *defendants [Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)] to automobiles. We decline to do so and find no error.

[19] We turn now to defendant's contention that the sentence of death in this case is excessive and disproportionate.

The General Assembly has mandated that this Court shall consider the matter of the death sentence being imposed and requires us to determine (§ 565.014.3, RSMo 1978):

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We find nothing in the record to suggest the sentence resulted from the influence of passion, prejudice, or any other arbitrary factor. There was substantial evidence to support the jury's finding of statutory aggravating circumstances. We conclude that considering the instant crime and the defendant in this case that the penalty imposed is not excessive nor disproportionate to the penalty imposed in similar cases. *State v. Stokes*, 638 S.W.2d 715 (Mo. banc 1982).

The judgment is affirmed.

RENDLEN, C.J., and HIGGINS, GUNN and DONNELLY, JJ., concur.

WELLIVER, J., concurs in result in separate opinion filed.

ROBERT E. SEILER, Senior Judge, concurs in part and dissents in part in separate opinion filed.

BLACKMAR, J., not participating because not a member of the Court at the time the cause was submitted.

Execution date set for May 13, 1983.

WELLIVER, Judge, concurring in result.

I concur in most of the principal opinion's reasoning and in its result. I am unable, however, to concur except as to the result in that part of the principal opinion that addresses appellant's argument that the evidence was insufficient to support the jury's finding of the statutory aggravating circumstance.

The death penalty may not be imposed unless the jury finds beyond a reasonable doubt one of the twelve statutory aggravating circumstances. § 565.012(4)–(5), RSMo Supp. 1982.[1] Those aggravating circumstances are enumerated in § 565.012(2). In this case the trial court instructed the jury on only one aggravating circumstance: that the murder "involved torture or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman." That instruction was taken from § 565.012(2)(7), which provides as a statutory aggravating circumstance that "[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." Appellant makes no argument regarding the fact that the trial court inverted the language of the statute, but in any event I do not believe that fact has any bearing upon this case. The jury found as a statutory aggravating circumstance that the murder involved "[t]orture, depravity of mind and that as a result it was outrageous and wantonly vile, horrible and inhuman." Appellant's argument is unclear, but it appears to be that the evidence was insufficient to support a finding of torture and that because the jury did not find "torture or depravity of mind" in the disjunctive language of the statute the lack of evidentiary support vitiates the finding of the statutory aggravating circumstance.

I agree with the principal opinion that appellant's argument is without merit, but I reach that conclusion for a different reason. Neither torture nor depravity of mind constitutes the aggravating circumstance. The aggravating circumstance is that the murder is "outrageously or wantonly vile, horrible or inhuman." The murder possesses that quality, the statute says, *because* it involves torture or depravity of mind. Thus, a finding of at least one—either torture or depravity of mind—is prerequisite to a finding of the aggravating circumstance. Here the jury found the aggravating circumstance. That it so found because it apparently thought the murder involved both torture and depravity of mind is inconsequential. I agree with the principal opinion that the evidence supports a finding of both, but only a finding of one or the other was necessary to a finding of the aggravating circumstance. There was no error.

I disagree with the principal opinion for two related reasons. First, it characterizes § 565.012(2)(7) as comprising two statutory aggravating circumstances rather than one. According to the principal opinion, torture and depravity of mind constitute separate aggravating circumstances. I believe, as demonstrated above, that the statutory language itself forecloses that reading. Second, having made that characterization, the principal opinion states that the evidence was sufficient to support a finding of "both statutory aggravating circumstances," and then it goes on to conclude that in any event "where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death thereon." I think this latter statement is both unnecessary and unwise.

The question whether the failure of one statutory aggravating circumstance found by the jury vitiates the death sentence is not present in this case. It is, however, pending before the United States Supreme Court. *See Zant v. Stephens*, 456 U.S.

1. All statutory references are to RSMo Supp. 1982.

410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982). In *Zant* the Supreme Court certified to the Georgia Supreme Court the following question: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" *Id.* at 1859. The Georgia Supreme Court has answered that question by stating that

> [a] case may not pass the second plane into that area in which the death penalty is authorized unless at least one statutory aggravating circumstance is found. However, this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one. Once beyond this plane, the case enters the area of the factfinder's discretion, in which all the facts and circumstances of the case determine, in terms of our metaphor, whether or not the case passes the third plane and into the area in which the death penalty is imposed.

Zant v. Stephens, 250 Ga. 97, 100, 297 S.E.2d 1, 4 (1982). Our cases accept a similar rationale underlying the use of statutory aggravating circumstances. *See State v. Shaw*, 636 S.W.2d 667, 675 (Mo.banc), *cert. denied*, — U.S. —, 103 S.Ct. 239, 74 L.Ed.2d 188 (1982); *State v. Bolder*, 635 S.W.2d 673, 682 (Mo. banc 1982), *cert. denied*, — U.S. —, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983). Nevertheless, we have never decided the question that the principal opinion would purport to decide. In *State v. Mercer*, 618 S.W.2d 1, 10 n. 5 (Mo. banc), *cert. denied*, 454 U.S. 933, 102 S.Ct. 432, 70 L.Ed.2d 240 (1981), we noted the Georgia Supreme Court's position on the issue, but we also noted that there is considerable authority to the contrary. The evidence in that case fully supported both of the aggravating circumstances that the jury found, *id.* at 10, and thus there was no issue of the failure of one of the aggravating circumstances.

The principal opinion's statement is of course only dictum, but it nevertheless is a strong dictum. I think it imprudent in advance of necessity to decide the issue it purports to settle, especially by making such an unqualified statement. In *Zant* the Georgia Supreme Court refused to adopt such an unconditional holding. That court stated that

> [a] different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed. Furthermore, this court must consider each case involving a failure of one or more of a multiple of statutory aggravating circumstances to determine whether, because of the failure, the sentence was imposed under the influence of an arbitrary factor.

250 Ga. at 101, 297 S.E.2d at 4.

We should not be quick to speak to this important issue. We should await a case in which the question is squarely presented so that we can give it full consideration. Perhaps by that time, too, we will have the guidance of the Supreme Court's final decision in *Zant*.

ROBERT E. SEILER, Senior Judge, concurring in part and dissenting in part.

I concur with that portion of the principal opinion which affirms the conviction of capital murder, but I respectfully dissent with respect to affirmance of the death penalty. My problem with the principal opinion in this regard is that it does not, in my opinion, demonstrate that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

If there is anything clear it is that for a death penalty statute to be valid, the statute must provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S.Ct. 1759, 1767, 64 L.Ed.2d 398 (1980); See also *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("similar

results ... in similar cases"); *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (1972) (White, J. concurring) ("meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) ("we cannot avoid the conclusion that an individualized decision is essential in capital cases"); *State v. Baker*, 636 S.W.2d 902, 911 (Mo. banc 1982) ("After examining these cases [referring to other cases] and giving to each of them the individualized consideration required ... we find that they do not point to excessiveness or disproportionality in the sentence in this case.")

The response of the Missouri legislature to the above requirement was to enact § 565.014.3(3)[1] which imposes on the court the duty of determining "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" and § 565.014.5(2) which authorizes us in instances of excessiveness or disproportionality to set the death sentence aside and remand for resentencing, as we did in *State v. McIlvoy*, 629 S.W.2d 333, 342 (Mo. banc 1982).

The principal opinion disposes of this aspect of the appeal with a single sentence at the close of the opinion, stating the conclusion that the penalty imposed is not excessive or disproportionate and citing, without elaboration, *State v. Stokes*, 638 S.W.2d 715 (Mo. banc 1982).

In *Stokes*, a thirty-three year-old divorcee, mother of three children, was found dead on the floor of her bedroom, nude, with a pillow case over her head and an apron wrapped around her neck, three days after she and defendant had left a bar together one night to go to her apartment. Her apartment was in disarray, with the bedroom ransacked. Her pendant watch and her automobile were missing.

The autopsy disclosed the following:

> "... a shallow incision, over the left upper chest just beneath the clavicle, that was two inches in length, one and one-half inches in width and just beneath the skin; a cut on the back of the right hand; a cut on the surface of the hand; a deep cut over the back; a large cut in the posterior aspect of the lower third of the right arm which measured three inches in length, one-half inch wide and two inches deep, extending to the bone; a large area of bruising that was slightly raised and purple over the left side of the chest; a large bruise internally over the left side of the chest; numerous bruises and abrasions on both sides of the neck, some irregular, and others in a straight line running around to the posterior aspect of the neck; the right side of the lips were swollen and dark purple; dried blood was present in and outside the nose; several scrapes or abrasions were present on the face, one on the right side of the nose and another on the right temple; multiple areas of hemorrhage within the neck muscles; areas of fresh hemorrhaging in the thyroid gland and in the larnyx; one of the angles of the hyoid bone had been broken recently; a rather large abrasion over the back and sacrum; a superficial, one-fourth inch deep cut into the subcutaneous fat on the right chest in the shape of a round puncture; and, a slight abrasion to the right knee; liver mortis was evident; examination of the vagina revealed spermatoza and it was thought that the victim had sexual intercourse within six hours of death; that the cause of death was manual strangulation although some linear abrasions apparently had been caused by the apron; that the victim was alive at the time of injury to the chest area as reflected by the condition of the resultant bruises; and, that death had occurred more than one day prior to the autopsy.

The defendant, Stokes, had an extensive record of prior convictions: one manslaughter, one second degree murder, three first degree robberies, three escapes, armed criminal action and theft of an automobile.

1. All statutory references are to RSMo 1978.

The jury assessed the death penalty and found four statutory aggravating circumstances:

1. Substantial history of serious assaultive convictions. § 565.012.2(1).

2. Murder for purpose of receiving something of value. § 565.012.2(4).

3. Murder involving torture or depravity and as result thereof outrageously or wantonly, vile, horrible or inhuman. § 565.012.2(7).

4. At the time of the murder defendant had escaped from custody. § 565.012.2(9).

In deciding the proportionality question of the death penalty the court first pointed out that the evidence supported the finding of the four specified statutory aggravating circumstances above. The court then returned to the "torture or depravity of mind" aggravating circumstance and divided the evidence on this aggravating circumstance into four types of acts:

1. The severe beating of the victim about the head and upper chest.

2. The five stab wounds caused by a sharp instrument.

3. The apron wrapped around the neck with minor linear lacerations in the flesh, indicating that the murderer attempted to strangle the victim by tightening the apron in garrotte like fashion.

The court pointed out the evidence was that all of the above injuries were sustained while the victim was yet alive.

4. Manual strangulation of the victim, as shown by violent internal damage to the neck, thus exaggerating the serious physical abuse inflicted prior to actual death.

When we consider both the crime and the defendant, *Stokes* and the present case are dissimilar. Stokes had such a bad previous record that he fell in the class of those who have a substantial history of serious assaultive convictions. In the present case the state did not even attempt to make such a charge against defendant and there was no evidence to support such a charge.[2] In addition, Stokes murdered to obtain something of value and did so at a time when he was an escapee. As to the torture and depravity comparison, the victim in the *Stokes* case had been badly beaten about the head and chest, had been stabbed at least five times, had been subjected to an attempted garrotting by tightening of an apron around her neck, violent enough to leave linear imprints in her flesh, and then had been manually strangled with force sufficient to produce internal hemorrhaging in the neck and fracture of the hyoid.

In the present case there was testimony as to bruises or contusions on the victim's forehead and right arm, but no contention is made that the victim was beaten as in *Stokes*. The autopsy disclosed two direct stab wounds to the chest, one of which penetrated both ventricles of the heart and which the pathologist testified "most assuredly would have caused death." The other stab wound was into the upper lobe of the left lung. In addition the victim's throat was cut, a wound which might not have caused death had prompt medical attention been available, according to the pathologist. As it was, the victim bled to death, almost a gallon of blood being found in the left chest. Vaginal examination disclosed no evidence of recent sexual activity.

Presumably the *Stokes* jury relied on all four statutory aggravating circumstances in assessing the death penalty. In the present case there was only one statutory aggravating circumstance. The factors which the court relied upon to uphold the death penalty in *Stokes* have not been demonstrated to be present in the case at bar. If *Stokes* is the bench mark, this case does not meet it.

2. In the present case the jury did find as a nonstatutory aggravating circumstance the fact that defendant had been convicted of rape in Kansas in 1974. The record contains no information as to the degree of rape, its severity, the age or condition of the victim or the length of sentence. The sentence could not have been too severe, as defendant obviously was out of prison in 1980. So far as rape itself is concerned, a death sentence for rape would be unconstitutional. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

The main thing which the *Stokes* case and the present case have in common is that in each the jury found the statutory aggravating circumstance of § 565.012.2(7)—the one involving torture or depravity of mind. Some of our statutory aggravating circumstances permit an objective determination, such as, for example, whether the capital murder is committed for something of value, or against a police officer on duty, or by one who is an escapee at the time. But the one about the offense "being outrageously or wantonly vile, horrible or inhuman in that it involves torture or depravity of mind" calls for a subjective analysis on the part of the jury of terms which are emotionally provocative. Juries have no way to see how the crime before them and the imposition of the death penalty therefor compares to similar cases. Only this court is in a position to do that. I take it that the principal opinion is not meant for the proposition that where a jury in one case finds the statutory aggravating circumstance of § 565.012.2(7) and assesses the death penalty it follows that the death penalty is not excessive or disproportionate simply because another jury in some earlier case also found the same class of aggravating circumstance and assessed the death penalty. The principal opinion certainly makes no such declaration and if we were to find lack of disproportionality from the mere fact that both the jury here and the jury in *Stokes* found the same class of statutory aggravating circumstance—torture and depravity, then we would end our inquiry before it even began. We would be placing absolute control in the hands of the jury so long as it finds the same class of aggravating circumstance as found in some other case where the death penalty was affirmed. This sort of unbridled jury discretion in sentencing to death would violate due process, as established by the cases cited at the outset hereof. The jury was the sole determiner before *Furman;* it cannot be so now.

The statute enjoins this court to look at "similar cases, considering both the crime and the defendant." The crime, of course, is the capital murder itself—what took place, what the defendant did. As for "similar", according to Webster's Third New International Dictionary (1967), p. 2120, it means having characteristics in common, alike in substance or essentials. All capital murders are alike in having the essentials called for by the statute defining the crime, § 565.001, and, factually, all have the characteristic of being worse than an ordinary homicide.

There is a vast array of capital murder cases in Missouri where what took place was equally or more revolting than what took place in the case at bar—cases which involve more killings, more stabbing, more blood, more callousness, more the mark of the beast—yet the punishment assessed was not death, but life imprisonment without possibility of parole for fifty years. Many of these are capital murders where stabbing and cutting have been the cause of death and where the state has sought the death penalty[3] with the aggravating circumstance of torture or depravity under § 565.012.2(7) being submitted to the jury. Others involve capital murders by shooting.

Making comparisons with similar cases involves a subjective analysis on our own

3. If we were to include in our universe or pool of cases for comparison, cases where the state, for some unstated reason, did not seek the death penalty, we would be hard put to find similar results in similar cases. We would be confronted with cases such as *State v. Holmes*, 609 S.W.2d 132 (Mo. banc 1980) and *State v. Hudgins*, 612 S.W.2d 769 (Mo.1981). In *Holmes*, the defendant stabbed his sixteen year-old victim at least sixty four times with an ice pick like instrument, including nine separate wounds to the heart—torture and depravity in the extreme. Defendant had three days earlier announced his intention to kill the victim, even specifying that he would do it by stabbing him some sixty odd times. In *Hudgins*, defendant's landlord died from loss of blood after defendant stabbed her twenty-one times as well as strangling her. Some of the wounds were seven inches deep. Defendant then strangled her six year-old son with an extension cord and placed the body in a bathtub filled with water. In both these cases the penalty was not death, but life without parole for fifty years. It is difficult to reconcile the outcome in these cases with the outcome in the present case.

part, but we have the time and the means by which to compare cases and then articulate why or what it is that causes us to reach the end result. Where do we find ourselves as to excessiveness or disproportionality of the death sentence in the present case when we compare it to these many cases, some of which are set forth briefly below, where the jury assessed not death, but life without parole for fifty years?

In *State v. Mitchell*, 611 S.W.2d 223 (Mo. banc 1981) and *State v. Turner*, 623 S.W.2d 4 (Mo. banc 1981), defendants were each found guilty of two counts of capital murder. They robbed a liquor store and killed the proprietor, age 72, and his employee, age 60. Both victims had been stabbed, one six to eight times in the chest and abdomen, and the other fifteen times, nine in the front part of the body and six in the back. Both victims also had severe wounds to the head from a blunt instrument such as a beer bottle or gun butt. In the *Mitchell* case, the jury was unable to agree on punishment and so, under § 565.006.2, defendant was sentenced to life without parole for fifty years on each count. In *Turner*, the jury assessed punishment on each count at life without parole for fifty years, not death.

In *State v. Fuhr*, 626 S.W.2d 379 (Mo. 1982), defendant, age 23, killed a forty-three year-old woman. The victim was stabbed twenty-nine times with a butcher knife. Money, a wallet, and rings were taken from the victim. The robbery was planned by the victim's daughter who asked the defendant to help. Some of the stab wounds had a depth of seven inches. The jury convicted defendant of capital murder and assessed the punishment not at death, but at life without parole for fifty years. The case was reversed and remanded for failure to instruct on first degree murder in the commission of robbery. Nevertheless, the jury's assessment of life rather than death establishes what the maximum punishment can be in this case on retrial in event of conviction of capital murder. *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The case therefore, is properly one for comparison.

In *State v. Hurt*, No. 64213, pending in this court, the defendant, age 19, an inmate in the state penitentiary, stabbed his 21 year-old cellmate to death with a knife. There were more than sixty stab wounds. The jury assessed punishment not at death, but at life without parole for fifty years. I realize this case has not been decided, but in other cases, we have referred to the facts in pending cases in determining proportionality. See *State v. Shaw*, 636 S.W.2d 667, 676 (Mo. banc 1982), where the court referred to the then pending case of *State v. Trimble* [638 S.W.2d 726 (Mo. banc 1982)] as a case involving the same aggravating circumstance as the *Shaw* case and one where the jury imposed the death penalty. Footnote 4 in the *Shaw* opinion points out that "We consider this case only to determine what penalty juries have imposed in factually similar situations" and cited *State v. Bolder*, 635 S.W.2d 673, 685 (Mo. banc 1982) in support. Footnote 8 in the *Shaw* case refers to *State v. Baker*, which had been argued and not yet decided at the time of *Shaw* (the jury imposed the death sentence in the *Baker* case) and also referred to another case pending here at the time but not yet argued, *State v. Davis*, No. 63474, where the jury assessed life without parole for fifty years, pointing out that the *Davis* case had evidence of extreme mental or emotional disturbance, something not present in *Shaw*. 636 S.W.2d at 676. In *State v. Baker*, mentioned above, 636 S.W.2d 902, 910 (Mo. banc 1982), the court, in considering proportionality of the aggravating circumstance of killing a police officer on duty, referred to *State v. Davis*, then pending in this court and which involved the same aggravating circumstance.

In *State v. Laws*, No. 63911, also pending in this court, defendant, age 31, with others, stabbed, choked and burned a 58 year-old man. The victim was kicked in the face, stabbed, and burned, although it could not be determined whether the victim was burned alive or was already dead. The victim was held hostage during the crime. The jury assessed punishment, not at death but life without parole for fifty years.

In *State v. Scott*, No. 63989, recently transferred to the court of appeals, defendant, age 16, stabbed to death a 60 year-old woman. Defendant and another man forced their way into the victim's home at gunpoint to rob the victim and her 88 year-old husband. While inside the house, defendant systematically stabbed the victim twenty-two times, tore out patches of her hair and scalp, and kicked her as she lay dying. The jury assessed punishment, not at death, but at life without parole for fifty years.

In *State v. Woods*, No. 62378, recently transferred to the court of appeals, defendant, age 25, stabbed to death a 21 year-old woman. The victim was stabbed seven or eight times. The jury assessed punishment not at death, but at life without parole for fifty years.

There are other Missouri cases where death is due either to shooting or strangling, not stabbing, and the statutory aggravating circumstance of torture or depravity has been submitted to the jury, yet the outcome has been life without parole for fifty years, not the death sentence. For example, in *State v. Gardner*, 618 S.W.2d 40 (Mo.1981), defendant, age 24, participated with George Mercer [see *State v. Mercer*, 618 S.W.2d 1, 11 (Mo. banc 1981)], in the strangulation killing of a 23 year-old woman. Defendant brought the victim to a house where Mercer was staying. Mercer forced the victim into a room where he raped her. Gardner subsequently raped her also. Gardner left the house saying that Mercer should kill the victim. Mercer strangled the victim to death and disposed of her body. As said, Gardner's punishment was fixed at life without parole for fifty years, not death.

In *State v. Borden*, 605 S.W.2d 88 (Mo. banc 1980), defendant, a 35 year-old woman, was convicted of the slaying of her husband. She fired a sawed-off .22 caliber rifle at him in his home where he was watching television. The couple's two small children were in the house at the time. At the time of the killing, defendant was engaged in an illicit romance. She had previously attempted to persuade her paramour to kill her husband.

In *State v. Bostic*, 625 S.W.2d 128 (Mo. 1981), defendant, age 35, struck and killed a 56 year-old woman. The victim was struck twice on the head with a pipe, dragged down the alley and loaded in a van. The defendant stepped on the victim's throat when she regained consciousness. The body was left in a ditch outside the town. Defendant also assaulted deceased sexually. The jury, instructed on the depravity of mind aggravating circumstance, put the punishment at life without parole for fifty years, not death.

In *State v. Laws*, No. 63983, recently transferred to the court of appeals, Laws, age 31, in concert with another, held hostage for more than an hour, shot and burned an 85 year-old woman while in the process of a burglary. The victim was also struck at least once in the head. The trial judge commented that the death sentence would have been appropriate had the jury elected to assess it. Instead, the jury assessed punishment at life without parole for fifty years.

State v. Baskerville, 616 S.W.2d 839 (Mo. 1981) is a good example of the lack of consistency in assessment of punishment for capital murder in this state when we compare cases. In *Baskerville*, the defendant was convicted of three counts of capital murder. The state sought the death penalty. One victim was shot twice, one was shot once, and a third, a child who begged for his life, was shot once. The jury, however, assessed punishment at life without parole for fifty years for the murders of the two adults, and the jury being unable to agree upon punishment for the capital murder of the child, the court assessed the same sentence in his case.

In its brief the state stresses that the death penalty should be sustained because the victim had "an opportunity to contemplate her fate" in that she was chased through her home. Yet in *State v. Royal*, 610 S.W.2d 946 (Mo. banc 1981), which was one of the cases used by the court for comparison purposes in *State v. Newlon*, 627 S.W.2d 606, 623 (Mo. banc 1982), the victim, a woman employee of the bank in

Neeleyville, was abducted during the bank robbery, forced into the car and driven to a remote rural area of Butler County where she was shot three times. The lengthy ride must have been increasingly terrifying and ominous to the helpless victim. The jury, however, assessed punishment at life without parole for fifty years, not death.

In discharging our duty to see that the sentence of death is not disproportionate to the penalty imposed in similar cases, we have stated "Our concern is that there be 'even-handed, rational and consistent imposition of death sentences under law'. *Jurek v. Texas*, 428 U.S. 262, 276 [96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976)", *State v. Bolder*, 635 S.W.2d 673, 684–85 (Mo. banc 1982). I fail to see where the present case has been distinguished in a principled or meaningful way from the many cases above where the homicide was just as bad or worse, yet the jury elected life without parole for fifty years as punishment, not death. If we for whatever reason, do not make the distinction (and I do not believe it can be made here), then I do not believe the death penalty can stand in the particular case under consideration. I would therefore set aside the death sentence and remand for sentencing.

Richard A. KING, Director of Revenue, State of Missouri, Appellant,

v.

LACLEDE GAS COMPANY, et al., Respondents.

No. 64265.

Supreme Court of Missouri, En Banc.

March 29, 1983.

Concurring Opinion April 26, 1983.

Rehearing Denied April 26, 1983.

Department of Revenue appealed from an order of the Administrative Hearing Commission granting a sales tax exemption to gas utility. The Supreme Court, Billings, J., held that the electricity used by gas utility for the operation of an underground storage field was not exempt from the sales tax on electricity on the grounds that the electricity was used in a noncommercial, nondomestic, and nonindustrial manner, where the use of the electricity was an integral part of the commercial activities of utility, and the facilities were essential to the utility's successful commercial operation.

Reversed.

Welliver and Donnelly, JJ., dissented and filed opinions.

Blackmar, J., concurred and filed opinion.

1. Administrative Law and Procedure ⇐796

Administrative agency decisions based on agency's interpretation of law are matters for the independent judgment of the reviewing court.

2. Statutes ⇐245

Tax statutes are to be strictly construed in favor of taxpayer.

3. Taxation ⇐1244

Electricity used by gas utility in its operation of underground storage field was not exempt from sales tax on ground that the electricity was used in a noncommercial, nondomestic and nonindustrial manner, since the electricity used was integral part of commercial activities of utility, and facilities were essential to utility's successful commercial operation; overruling *Kansas City Power and Light Co. v. Smith*, 342 Mo. 75, 111 S.W.2d 513, and *Kansas City Power and Light Co. v. Kansas City Public Service Company*, 342 Mo. 45, 111 S.W.2d 516. V.A.M.S. § 144.020, subd. 1(3).

John Ashcroft, Atty. Gen., Melodie A. Powell, Asst. Atty. Gen., Jefferson City, for appellant.

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	No. 63569
	)	
ANTHONY J. LaRETTE, JR.,	)	
	)	
Defendant-Appellent.	)	

MOTION FOR REHEARING

APPELLANT'S BRIEF
(In forma pauperis)

Donald C. Tiemeyer
408 Jefferson Street
St. Charles, Missouri 63301

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	No. 63569
	)	
ANTHONY J. LaRETTE, JR.,	)	
	)	
Defendant-Appellent.	)	

MOTION FOR REHEARING

APPELLANT'S BRIEF
(In forma pauperis)

Appellant moves this Honorable Court for a rehearing in the above cause on the following grounds:

1. The Court in its opinion of March 29, 1983, inadvertently misinterpreted and overlooked the law and facts of this case by holding that "the Defendant has failed to sustain his burden that the failure to bring him to trial within the statutory period was occasioned by the State. State vs. Franco, 625 S.W.2d 596 (Mo. 1982); State vs. Newberry, 605 S.W.2d 117 (Mo. 1980)." (Majority opinion page 7, 8). For the reason that Section 545.780 of the Revised Statututes of Missouri, and specifically Subsection two (2) thereof requires, mandatorily, that trial shall commence within 180 days of arraingment. The transcript of Court proceedings clearly demonstrates that the delay herein was occasioned by the failure of the State Court Administrators Office to prepare and provide to the Defendant, pursuant to Supreme Court Rule, a copy of the transcript of the preliminary hearing herein. The true cause of the cotinuance is clearly demonstrated and the Court has inadvertently misinterpreted the Defendant's role in each such continuance as being excusable delay, as provided for in Section 545.780 of the

Revised Statutues of Missouri, subsection 5a, when in fact the Defendant was placed in the Hobson's Choice of either proceeding to trial without the preliminary hearing transcript, which he was entitled to receive pursuant to Supreme Court Rules and decisions of this Honorable Court, or to request a continuance The continuance granted was clearly not occasioned by any act on the part of the Defendant.

2. The Court in its opinion of March 29, 1983, inadvertently misinterpreted an overlooked the law and the facts of this case by holding that, "aside from this, we are of the opinion the evidence was sufficient and substantial to support the finding of both statutory aggravating circumstances." (Majority opinion page 9) for the reason that this finding is in conflict with Section 565.012 of the Revised Statutes of Missouri in that "torture or depravity of mind" constitute, jointly, one of the statutory agrravating circumstances. The facts herein do not support the finding of depravity of mind and the facts relied upon to support the finding as to torture clearly would equally, and probably more logically, support a theory of flight after the infliction of a serious wound. The death of a human being almost, of necessity, involves certain physical violence being done to the body and equally, most usually, involves a significant amount of pain and suffering. The decision of the State Legislature of the State of Missouri to provide for capital punishment in Missouri clearly recognizes that capital punishment is to be applied in the limited number of cases, most particularly those cases where there is exceptional violence or physical injury and suffering. The Court's majority opinion overlooks the serious question, nationwide, of whether or not the mere killing of another human being, after the infliction of a mortal wound which, although certainly causing death, does not cause death instantaeously, constitues torture. The Court's majority decision herein clearly overlooks the facts in the case which are certainly equally consistent with the view that the mere infliction of wounds, which resulted in the death of a person, do not, by their number, location or depth necessarily constitute torture. Appellant's brief lists a number of cases decided nationwide, which involve facts very similar to the facts

herein, and cases in which it was determined that the injuries inflicted and the nature and types of injuries did not, ipso facto, constitute torture.

3. That the Court in its opinion of March 29, 1983 inadvertently misinterpreted and overlooked law in facts of this case by holding that the Defendant's statements, made to a number of police officers were free and voluntary for the reason that the evidence clearly established that the Defendant had not slept in almost 24 hours and had not eaten in a equally long period of time. The detention of the Appellant herein without food and sleep for such a substanial period of time clearly vitiated his free will and resulted in any statements made by him not being his free and voluntary act.

4. The Court in its opinion of March 29, 1983 inadvertently misinterpreted and overlooked the law and facts of this case by holding "we conclude that considering the instant crime and the Defendant in this case that the penalty imposed is not excessive nor disproportionate to the penalty imposed in similar cases. State vs. Stokes, 638 S.W.2d 7 5 (Mo.banc 1982)." For the reason that the decision herein is grossly disimilar to the facts in State vs. Stokes, 638 S.W.2d 715 (Mo.banc 1982). In Stokes, death was occasioned by:

a) The severe beating of the victim about the head and upper chest.

b) The five (5) stab wounds caused by a sharp instrument.

c) The apron wrapped around the neck with minor linear lacerations in the flesh, indicating that the murderer attempted to strangle the victim by tightening the apron in garrotte like fashion.

The Court pointed out that the evidence was that all of the above injuries were sustained while the victim was yet alive.

d) Manual strangulation of the victim, as shown by violent internal damage to the neck, thus exaggerating the serious physcial abuse inflicted prior to actual death. It is clear in the Stokes case that the death caused by the Defendant

presumably over a relatively long period of time, in culminating by the physical and manual strangulation of the victim by the Defendant.

Clearly the Court can paint the picture in its mind, in the Stokes case of a Defendant bending over his victim and squeezing the last breaths of life out of an already limp and dying body. The case herein shows no documented evidence of any prolonged contact between the assailant and the victim. The facts show only stab wounds to the upper body and to the neck and the consequent exgorgation of considerable amounts of blood. The fact that the victim herein died by a loss of blood rather than by an internal bullet wound to the heart or by other less grusome looking methods cannot sway the determination as to what was in the mind of the perpetrator. The facts presented at trial, and not the speculations as to how the act may have occurred, must be the true consideration of this Court. When the facts alone of this case are compared with the heinous facts of the Stokes case it becomes abundantly clear that Stokes cannot be relied upon as showing similarity to the finding of the jury herein. Our capital punishment law requires not only that the jury find statutory aggravating circumstances but has, as an additional safeguard, the requirement that this Honorable Court compare and contrast the decisions of juries throughout the State and determine that a certain standard is met before human life is taken. In determining that the case herein is of the same nature and magnitude as other cases wherein capital punishment was approved overlooks the following cases, reviewed by this same Court, which reflect deaths clearly caused by similar means and in similar fashions, but wherein the juries, exercising reasonable and prudent discretion, determine the appropriate penatly to be imprisonment for a period of 30 years without parole:

In State v. Mitchell, 611 S.W.2d 223 (Mo.banc 1981) and State vs. Turner, 623, S.W.2d 4 (Mo.banc 1981), defendants were each found guilty of two counts of capital murder. They robbed a liquor store and killed the proprietor, age 72, and his employee, age 60. Both victims had been stabbed, one six to eight times in the chest and abdome,

and the other fifteen times, nine in the front part of the body and six in the back. Both victims also had severe wounds to the head from a blunt instrument such as a beer bottle under chapter 565.006.2, defendant was sentenced to life without parole for fifty years on each count. In Turner, the jury assessed punishment on each count at life without parole for fifty years, not death.

"In State vs. Fuhr, 626 S.W.2d 373 (Mo. 1982), defendant, age 23, killed a forty-three year-old woman. The victim was stabbed twenty-nine times with a butcher knife. Money, a wallet, and rings were taken from the victim. The robbery was planned by the victim's daughter who asked the defendant to help. Some of the stab wounds had a depth of seven inches. The jury convicted defendant of capital murder and assessed the punishment not at death, but at life without parole for fifty years." (Dissenting opinion page 7, 8.).

Further the comparison suggested by the Honorable Justice Robert E. Seiler are certainly persuasive in citing seven (7) cases, decided by juries in this State and involving stabbings of a more heinous nature than this, which were determined, by juries exercising careful and prudent consideration, to be punished by life inprisonment without parole for fifty years. In the majority decision, the Court inadvertently overlooked the many cases cited in this State which, when reviewed, clearly show that the imposition of death sentence in this case is clearly disproportionate to the penalty imposed in similar cases.

WHEREFORE, for the above causes, Appellant respectfully requests this Court to grant him a rehearing in this cause.

Respectfully Submitted:

Donald C. Tiemeyer
Attorney for Appellant
408 Jefferson Street
St. Charles, Missouri 63301
724-0499 946-7899

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
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THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

April 26, 1983

Mr. Donald C. Tiemeyer
408 Jefferson Street
St. Charles, MO 63301

In re: State of Missouri vs. Anthony Joe LaRette, Jr.
No. 63569

Dear Mr. Tiemeyer:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

Thomas Simon

Clerk

cc: Attorney General

EXHIBIT "B"

IN THE CIRCUIT COURT OF WARREN COUNTY, MISSOURI
DIVISION I
12TH JUDICIAL CIRCUIT

STATE OF MISSOURI,
Plaintiff,
vs.
ANTHONY J. LARETTE, JR.,
Defendant.

Cause No. CR581-15F

JUDGMENT AND SENTENCE

Now on this 7th day of October, 1981, comes Donald L. Kohl, Assistant Prosecuting Attorney of St. Charles County, Missouri, who prosecutes on behalf of the State, and also comes the defendant in his own proper person in the custody of the Sheriff of this County and in the presence of his attorney, Donald C. Tiemeyer, in open court, whereupon said defendant is informed by the Court that on August 14, 1981, the jury returned its verdict finding said defendant guilty of the crime of capital murder in violation of Section 565.001 RSMo, and that the jury, by its verdict, fixed said defendant's punishment at death pursuant to Sections 565.008 and 565.012, RSMo.

And being asked by the Court if he has any legal cause to show why judgment and sentence should not be pronounced against him in accordance with the verdict of the jury and according to law, and said defendant failing to show sufficient cause, it is considered, ordered, adjudged and decreed by the Court that the defendant Anthony J. LaRette, Jr., having been found guilty aforesaid, be sentenced to the punishment of death by the administration of lethal gas as provided by law.

It is further ordered that the Sheriff of this County shall deliver said defendant on October 7, 1981, to the Warden of the State Penitentiary at Jefferson City, Missouri, for execution of the sentence adjudged herein.

It is further ORDERED, ADJUDGED and DECREED that the sentence of death upon this judgment be executed November 16, 1981, by the administration of lethal gas as provided by law, said execution to be carried out under the supervision and direction of the Warden of the State Penitentiary at Jefferson City, Missouri.

It is further ORDERED that in delivering said defendant from this County to the Warden of the State Penitentiary the Sheriff shall be authorized one extra guard.

Edward D. Hodge

EDWARD D. HODGE
Circuit Judge

APPENDIX

STATUTES INVOLVED

Section 565.001, R.S.Mo. 1978

Capital murder defined

Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

Section 565.006, R.S.Mo 1978

Verdict as to guilt, when rendered--instruction by court, limitation--presentence hearing, admissible evidence--penalty, when imposed--reversible error, effect

1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. In each jury capital murder case, the court shall not give instructions on any lesser included offense which could not be supported by the evidence presented in the case.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge, at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty, or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and argument the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within

the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

Section 565.008, R.S.Mo. 1978

Death penalty, when imposed--life imprisonment, when imposed--minimum of fifty years to be served, when--first and second degree murder, penalties for

1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

2. Persons convicted of murder in the first degree shall be punished by imprisonment by the division of corrections during their natural lives. Persons convicted of murder in the second degree shall be punished by imprisonment by the division of corrections for a term of not less than ten years.

Section 565.012, R.S.Mo. Supp. 1982

Evidence to be considered in assessing punishment in capital murder cases

1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence;

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence;

(3) Any mitigating or aggravating circumstances otherwise authorized by law; and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

(11) The capital murder was committed while the defendant was engaged in the perpetration or in the attempt to perpetrate the felony of rape or forcible rape or the felony of sodomy or forcible sodomy;

(12) The capital murder was committed by the defendant for the purpose of preventing the person killed from testifying in any judicial proceeding.

3. Statutory mitigating circumstances shall include the following;

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

Section 565.014, R.S.Mo. 1978

Supreme court to review all death sentences, notice, contents of--findings required--assistant to supreme court authorized, duties of

1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shall consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

4. Both the defendant and the state shall have the right to submit briefs within the time provided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Missouri in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital cases in which sentence was imposed after May 26, 1977, or such earlier date as the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorized to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Section 565.016, R.S.Mo. 1978

Finding of unconstitutional provisions, effect of

1. If the United States Supreme Court or the supreme court of Missouri declares the offense of capital murder or the death penalty to be in violation of any provision of the Constitution of the United States or the constitution of Missouri, any killing which would be capital murder under any of the circumstances specified in section 565.001 shall be deemed to be murder in the first degree and the offender shall be charged and, if convicted, punished as provided by law, except that, he shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

2. If a person is convicted of capital murder and the death penalty imposed after May 26, 1977, and, subsequent thereto, the offense of capital murder or the death penalty is declared by the United States Supreme Court or the supreme court of Missouri to be in violation of any provision of the Constitution of the United States or the constitution of Missouri, a person so convicted and sentenced shall be brought back before the court which originally passed sentence and that court shall resentence such person to imprisonment by the division of corrections during his natural life. A person resentenced under the provisions of this section shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

VERDICT FORM

Jurors: Use this form only if the punishment fixed by you is death. See Instruction No. [illegible] for directions as to what must be written into the verdict form if the death penalty is imposed. Use the reverse side of this form if necessary. The foreman's signature must appear at the end of the matter which you designate in writing as the aggravating circumstance or circumstances which all twelve jurors found beyond a reasonable doubt.

We, the jury, having found the defendant guilty of the capital murder of Mary Fleming, fix the defendant's punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

Torture, Depravity of mind [illegible] that as a [illegible] it was outrageous [illegible] wantonly [illegible]

[illegible]

Anthony J. LaRette [illegible] [illegible] convicted [illegible] in the [illegible] County [illegible] State of [illegible]

[illegible]

Foreman

8. During the latter part of July, 1980, Tony received a phone call from a friend in St. Louis, Missouri, Rick Roberson, and Tony discussed with Rick Roberson about Tony coming to St.Louis to visit him. That sometime thereafter, the exact date being unsure, Tony boarded a bus in Topeka, Kansas, headed for St. Louis, Missouri.

9. That Tony appeared capable of traveling alone and handling himself on this bus trip.

10. That when Tony returned to Topeka, Kansas, after being gone several days to a week, he was still acting very upset like he was before he left on his trip."

MR. TIEMEYER: I have no further evidence, Your Honor.

(DEFENDANT RESTS.)

THE COURT: Ladies and gentlemen of the jury:

INSTRUCTION NO. 19

You will now hear argument by the Prosecuting Attorney and by counsel for the defendant regarding the punishment to be imposed. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed by the evidence as you remember it, the

reasonable inferences which you believe should be drawn, and the law as given in instructions of the Court.

After counsel have argued the matter, the Court will give you further and final instructions concerning the law relating to the punishment. It is your duty and yours alone to decide upon the punishment to be imposed upon the defendant and to render such verdict under the law and the evidence.

The State's attorney must open the argument. Counsel for the defendant may then make his argumen No further argument is permitted by either side.

MAI-CR 2d 15.36
SUBMITTED BY THE STATE

(Jury argument is then presented by the State and the Defendant.)

THE COURT: Ladies and gentlemen:

INSTRUCTION NO. 20

The law applicable to this stage of the trial is stated in these instructions and those which were read to you when we began this phase of the case. All of these instructions will be given to you to take to your jury room for use during your deliberations.

You must not single out certain instructions and disregard others or question the wisdom of any

rule of law.

I do not mean to assume as true any fact referred to in these instructions but leave it to you to determine what the facts are and what the punishment should be.

MAI-CR 2d 15.38
SUBMITTED BY THE STATE

INSTRUCTION NO. 21

In determining the punishment to be assessed against the defendant for the murder of Mary Fleming, you must first unanimously determine whether the murder of Mary Fleming involved torture or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt the foregoing circumstance and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that the foregoing circumstance exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

MAI-CR 2d 15.40
SUBMITTED BY THE STATE

INSTRUCTION NO. 22

If you find and believe from the evidence beyond a reasonable doubt that the circumstance submitted in Instruction No. 21 exists and that it is an aggravating circumstance, it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of defendant. In deciding that question you may consider all of the evidence relating to the murder of Mary Fleming.

You may also consider the aggravating circumstance referred to in Instruction No. 21 which you found beyond a reasonable doubt.

You may also consider any of the following circumstances if you find from the evidence beyond a reasonable doubt that it exists and that it is an aggravating circumstance:

1. That Anthony J. LaRette, Jr., was convicted of burglary, Count I and theft, Count II, in the District Court of Shawnee County, State of Kansas, on January 24, 1979, and

2. That Anthony J. LaRette, Jr., was convicted of rape in the District Court of Douglas County, State of Kansas, on July 22, 1974, and

3. That Anthony J. LaRette, Jr., was convicted of pocket picking in the District Court of Shawnee County, State of Kansas, on June 12, 1972.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

MAI-CR 2d 15.42
SUBMITTED BY THE STATE

INSTRUCTION NO. 23

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 22, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist, which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Mary Michele Fleming.

You may also consider:

1. Whether the murder of Mary Michele Fleming was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

2. Whether the Defendant acted under extreme duress or substantial domination of another person.

3. The age of the Defendant at the time

of the offense.

You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.

If you unanimously decide that a sufficien mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing Defendant's punishment at imprisonment for life by the Division of Correcti without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

MAI-CR 2d 15.44
SUBMITTED BY THE DEFENDANT

INSTRUCTION NO. 24

Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you.

MAI-CR 2d 15.46
SUBMITTED BY THE STATE

INSTRUCTION NO. 25

You will be provided with forms of verdic for your convenience. You cannot return any verdict as the verdict of the jury unless all twelve jurors concur in and

agree to it, but it should be signed by your foreman alone.

If you decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Mary Fleming, your foreman must write into your verdict the aggravating circumstance submitted in Instruction No. 21 which you found beyond a reasonable doubt. In addition, your foreman must write into your verdict all of the other specifically mentioned aggravating circumstances submitted in Instruction No. 22 which you found beyond a reasonable doubt.

If, after considering all of the evidence and instructions of law, you decide that the defendant must be punished for the murder of Mary Fleming by imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence, your foreman will sign the verdict form so fixing the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the court will fix the defendant's punishment at imprisonment for life by the

EXCERPT FROM PETITIONER'S BRIEF IN MISSOURI SUPREME COURT

II.

THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT A NEW TRIAL ON THE BASIS THAT THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO FIND "TORTURE" AS AN AGGRAVATING CIRCUMSTANCE IN ITS VERDICT FORM.

Section 565.012(5) R.S.Mo. (1980 Supp.) provides that the death penalty shall not be imposed unless one of the statutory aggravating circumstances of Section 565.012(2) is found by the jury. The particular subparagraph of Section 565.012 applicable in this case is Section 565.012(7) which provides:

> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." (Emphasis added)

This standard is couched in the disjunctive in that it permits a jury to find either torture or depravity of mind to support the imposition of the death penalty. The jury in this case found both elements in the conjunctive, i.e. "torture", depravity of mind." (T. 797). The element of depravity of mind will be discussed separately, infra.

Concerning the issue of what constitutes "torture", the State of Georgia has construed the term to require "serious physical abuse before death." Hance v. State, 268 S.E.2d 339, 345 (Ga. 1980), citing Godrey v.Georgia, 446 U.S. 420, 100 S.Ct. at 1759, at 1766, 64 L.Ed.2d 398 (1980); Hill v. State, 271 S.E.2d 802, 810 (Ga. 1980).

Also, the State of California has been interpreting the word "torture" in its first degree murder statute for many years. In People v. Tubby, 207 P.2d 51,54 (Cal. 1949), quoting People v. Hesley, 163 P.2d 21, 27, the California Supreme Court interpreted the word "torture" as follows:

> "'Implict in that definition is the requirement of an intent to cause pain and suffering in addition to death. That is, the killer is not satisfied with killing alone. He wishes to punish, execute vengence on, or extort something from his victim, and in the course, or, as the result of inflicting pain and suffering, the victim dies...'"

The Court continued in saying:

> "The test cannot be whether the victim merely suffered severe pain since presumably in most murders severe pain precedes death." Tubby, supra, at 54.

In Missouri, it is significant that in the death penalty case of State v Mercer, 618 S.W.2d 1 (Mo banc 1981), wherein the victim was forced at gunpoint to perform sexual intercourse and oral sex with defendant and his cohorts; was strangled, choked, and struck by defendant before death, the jury did not find "torture" as an aggravating circumstance, but did find "depravity of mind." While it is not totally clear from the case report on State v. Mercer whether or not the trial court submitted both torture and depravity of mind to the jury, it is significant in either event that: (1) either the jury did not believe the victim had been "tortured" despite the very cruel, physical and psychological abuse of the victim over an extended period of time; or (2) that despite the above facts and evidence, the trial court did not believe such constituted torture and therefore did not submit this issue to the jury.

In the present case, there was no evidence of any orchestrated physical or sexual abuse of the victim. There was no evidence that Defendant intended to cause pain and suffering in addition to death. In fact, as will be argued herein, infra, there was insufficient evidence of the requisite mental state to support a conviction of capital murder.

The State's evidence only reflects that defendant and the victim struggled, and that in a rapid sequence of events, Defendant stabbed the victim twice in the chest and cut her throat as she attempted to flee from the Defendant inside her home. And further, that all of these events occurred in a heat of passion as reflected by, the oral admissions of defendant as related by Detectives Plummer and Harvey (T. 488, 524). The defendant allegedly stated that he had entered the victim's residence to burglarize it and was surprised by the victim. The defendant grabbed the victim and placed his hand over

her mouth and told her she would not be hurt if she didn't scream for help, "then it happened - she lied like my wife" (T. 488, 524).

Thus, there simply is no evidence in the record of any acts or conduct of the Defendant that a jury could characterize as torture of the victim. And further, as will be elaborated upon infra, the fact that the jury in its verdict form found that the defendant had committed torture and exhibited depravity of mind by his conduct certainly calls into question and raises serious doubt whether the rural, Warren County jury in fact used the Court's instruction on aggravating circumstances as a "roving commission" and essentially disregarded the substantive meaning of the term "torture" in its ordinary sense, having predetermined that the defendant should die for his actions irrespective of the Court's guidelines to the jury for its deliberations.

ORIGINAL

No. 82-6979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ANTHONY J. LARETTE, JR.

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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TABLE OF AUTHORITIES

Constitutional Provisions and Statutes Cited

OPINION BELOW

The opinion of the Supreme Court of Missouri affirming petitioner's conviction of capital murder and sentence of death is reported as State v. LaRette, 648 S.W.2d 96 (Mo. banc 1983).

STATEMENT OF THE CASE

Petitioner Anthony J. LaRette, Jr., was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the murder of Mary Fleming. The facts of this crime are extensively set out in State v. LaRette, 648 S.W.2d 96, 98-101 (Mo. banc 1983), and will not be restated here. Respondent would note that the facts as stated in petitioner's petition are self-serving and argumentative in that he omits numerous references to the evidence establishing his guilt and advances factual issues which were rejected by the verdict of the jury.

Of the three claims presented by petitioner in his present petition, the first (relating to the Missouri Supreme Court's procedure of proportionality review) was only arguably raised for the first time in petitioner's Motion for Rehearing following the issuance by the Supreme Court of its opinion affirming his conviction and sentence. Under Missouri law, motions for rehearing may not be used to present new issues to the court (see respondent's Argument, infra). Petitioner's second contention, that the aggravating circumstances found in his case were made into two aggravating circumstances by the Missouri Supreme Court and thus unconstitutionally construed Missouri's death penalty statutes, has never been advanced to any state trial or appellate court. Likewise, petitioner's third contention, that the opinion of the Missouri Supreme Court affirming petitioner's conviction contravened Zant v. Stephens, ____ U.S. ____ 51 U.S.L.W. 4891 (1983) has never been advanced to any state trial or appellate court.

ARGUMENT

1. Proportionality Review of Death Sentences

The first of three theories advanced by petitioner is that the Missouri Supreme Court failed to conduct a proper review on the issue of whether his death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," § 565.014.3(3), RSMo 1978, which review petitioner claims was required. Petitioner claims that the court's failure to properly conduct the proportionality review denied petitioner effective assistance of counsel. Petitioner's attempt is to bring his case within the scope of the issue currently before this Court in Pulley v. Harris, No. 82-1095 (cert. granted March 22, 1983).

A major initial difficulty with this contention, wholly unaddressed by petitioner in his petition, is that the present claim has not as yet been presented in any reviewable fashion to the Missouri courts. Petitioner's first attempt to challenge the Missouri Supreme Court's process of proportionality review came after the appellate affirmance of his conviction and sentence, petitioner only arguably presenting the contention in his Motion for Rehearing before the Supreme Court. Under long-established Missouri law, legal claims and theories are not properly reviewable when raised for the first time in motions for rehearing after the issuance of the opinion by the appellate court. State v. Bolder, 635 S.W.2d 673, 693 (Mo. banc 1982), cert. denied, ___ U.S. ____, 103 S.Ct. 770 (1983); State v. Oliver, 520 S.W.2d 99, 101-102 (Mo.App.,Spr.D. 1975). Missouri Supreme Court Rule 84.17 states that "[t]he sole purpose of a motion for rehearing is to call attention to material matters of law or facts overlooked or misinterpreted by the court, as shown by its opinion." In light of these authorities, the present contention is not properly reviewable in the present petition. As this Court has noted,

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system" (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 422 U.S. 510, 527 (1979). Since there is not the slightest indication from the Missouri Supreme Court's opinion that it reviewed petitioner's improperly-raised claim, cf. State v. Bolder, supra, at 693, it cannot be said that they were "adequately presented in the state system." Street v. New York, 394 U.S. 576, 582 (1969). Unless and until petitioner makes some attempt to properly present this issue in a state court, review in the federal system is inappropriate. See Rose v. Lundy, 455 U.S. 509, 518 (1982).

Even ignoring petitioner's failure to obtain a state court adjudication of the issue he currently presents, the absence of a legitimate ground for the granting of a writ of certiorari is apparent from the record. To begin with, it is absurd for petitioner to equate the situation in the case at bar with that in Pulley v. Harris, supra. In Harris, the California Supreme Court made no mention of the proportionality issue in its opinion affirming the defendant's conviction and sentence, People v. Harris, 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240 (1981), and the Ninth Circuit concluded therefrom that the state court "gave no indication that any type of proportionality review...was undertaken." Harris v. Pulley, 692 F.2d 1189, 1196 (9th Cir. 1982), cert. granted, 51 U.S.L.W. 1144 (March 22, 1983). In the present case, by contrast, the Missouri Supreme Court explicitly reviewed and discussed this issue in its opinion:

We turn now to defendant's contention that the sentence of death in this case is excessive and disproportionate.

The General Assembly has mandated that this Court shall consider the matter of the death sentence being imposed and requires us to determine (§ 565.014.3, RSMo 1978):

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We find nothing in the record to suggest the sentence resulted from the influence of passion, prejudice, or any other arbitrary factor. There was substantial evidence to support the jury's finding of statutory aggravating circumstances. We conclude that considering the instant crime and the defendant in this case that the penalty imposed is not excessive nor disproportionate to the penalty imposed in similar cases. State v. Stokes, 638 S.W.2d 715 (Mo. banc 1982). State v. LaRette, 648 S.W.2d 98, 105 (Mo. banc 1983).

In the face of this language, it cannot legitimately be asserted by petitioner that certiorari should be granted in this case under the aegis of Pulley v. Harris, supra.

To the extent that it does not consist of a series of cited platitudes (Petition at 6-8), petitioner's argument seems to be that, because the Missouri Supreme Court did not extensively cite, compare and discuss in its opinion the other cases before it in which the sentences of death and life imprisonment were submitted to the jury the court failed to conclude a proper review on the issue of proportionality (Petition at 8). Petitioner elaborates upon this allegation by imputing improper motives to the Supreme Court, describing its proportionality review as a "cursory, dilatory fashion" running "roughshod over those protections preserved by the statute and relied on in this Court's opinions" (Petition at 8). The difficulty with these assertions is that, whatever petitioner might wish to conclude, this is an issue of fact and the record if devoid of the slightest evidence which would support his allegations. In its opinion affirming his conviction and sentence, the Supreme Court stated that it had reviewed the facts of the present case and, in comparing this case with other cases previously before it, concluded that petitioner's sentence was not excessive or disproportionate. State v. LaRette, supra, at 105. Petitioner now asks this Court to conclude, on the basis of a completely silent record, that the Missouri Supreme Court was perpetrating a fraud when it stated that it properly considered the other cases in rendering its decision. Such an attempt by petitioner is insupportable. It cannot reasonably be argued, and petitioner does not even attempt to contend, that it is a matter of constitutional import whether all aspects of the state court's proportionality review appear on the face of the appellate opinion, or whether the details of this review are ascertained by other evidence.

Petitioner further argues that the Missouri Supreme Court's "method of 'no-review'" denies petitioner effective assistance of counsel in that counsel was unable to present the argument that petitioner's sentence was disproportionate not knowing "the criteria or pool of similar cases by which proportionality review is to be conducted." (Petition at 9). The Missouri Supreme Court has repeatedly held the cases properly subject to comparison with a case where the death penalty is rendered are those "in which both death and life imprisonment were submitted to the jury, and which have been affirmed on appeal." State v. Mercer, 618 S.W.2d 1, 11 (Mo. banc 1981), cert. denied 102 S.Ct. 432 (1982).[1] Petitioner's counsel on appeal cited and discussed fourteen cases by which to compare petitioner's sentence. Thus, petitioner had ample opportunity to present his proportionality argument to the Missouri Supreme Court.

Finally, petitioner argues that the Missouri Supreme Court violated petitioner's substantive due process right, by failing to conduct a proportionality review created by state statute. The Missouri Supreme Court stated that it had reviewed the facts of the present case and comparison with other cases allowed the conclusion that petitioner's sentence was not excessive or disproportionate. Petitioner's assertains to the contrary are unsupportable. That being the case, petitioner's first claim presents no colorable issue which is reviewable by this Court on the present record.

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[1] A reading of the Supreme Court summaries of capital murder cases prepared pursuant to § 565.014.6, show that only 11 involved a sentence of death and 14 imposed the alternative sentence for capital murder, life imprisonment with no possiblity of parole for fifty years. If requested, respondent will supply certified copies of these summaries, which are contained in the Missouri Supreme Court's file on petitioner's appeal.

2. Aggravating Circumstance

Petitioner's second claim is that the Missouri Supreme Court in its review of petitioner's death sentence, under § 565.014.3(2) RSMo 1978 concluded that the jury found two aggravating circumstances when it found that:

> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or deprivity of mind."

§ 565.012.2(7) RSMo 1978 and thus the court violated the Missouri Statutes "the constitutionality of which depends on its meaningful review of death sentences." (Petition at 12). The inital point to be noted is that this theory was never advanced in any form before any state trial or appellate court. Accordingly, the present claim should not be heard for the first time here. Webb v. Webb, supra at 496-497.

In any event, the argument by petitioner is unsupported by any cited opinion of this Court. Clearly, and petitioner admits in his petition (petition at 12), that the only aggravating circumstance submitted to the jury was, as previously cited:

> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

§ 565.012.2(7) and it constitutes one aggravating circumstance which the jury so found. The Missouri Supreme Court, in its analysis and consideration did not alter the instruction given to the jury nor did it alter the jury's verdict. In Gregg v. Georgia, 428 U.S. 153 (1976), the holding of this Court was that the present aggravating circumstance was constitutionally valid so long as it was not overbroadly applied in the individual cases. Gregg v. Georgia, supra, at 201. Petitioner does not complain that the aggravating circumstance was applied overbroadly only that the Missouri Supreme Court interpreted it as two aggravating circumstances, thus not asserting a violation of Godfrey v. Georgia, 446 U.S. 420 (1980). Simply put, the

submitted aggravating circumstance, however petitioner cares to interpret the Missouri Supreme Court's choice of language, is a simple aggravating circumstnace and is not in the proper posture to take up the question left reserved in Zant v. Stephens, ___U.S.____, 51 U.S.L.W. 4891, 4898 (1983): i.e. "the possible significance of a holding that a particular aggravating circumstance is 'invalid'" might be inasmuch as the aggravating circumstance found by the jury in the instant case is a valid one. Nothing in the facts of this case warrants a review by certiorari of petitioner's conviction and sentence.

3. Violation of Zant v. Stephens

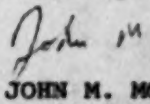
Finally, petitioner asserts that the Missouri Supreme Court violated the holding of this Court in Zant v. Stephens, supra. As with petitioner's previous contentions this claim was never advanced in any form before any state trial or appellate court. Accordingly, under Webb v. Webb, supra at 496-497, this claim should not be heard for the first time here. In any event, the instant case, despite petitioner's arguments to the contrary, is not in the proper posture to address the question reserved in Zant v. Stephens, supra. The jury returned only the statutory aggravating circumstance discussed in point II supra, and petitioner does not claim it is violative of Godfrey v. Georgia, supra. Thus, the jury did not find an aggravating determined to be invalid. Nothing in the facts of this case warrants a review by this Court on certiorari.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN ASHCROFT
Attorney General



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